UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA
- - - -

219 F.S. 401

Supplemental APPELLEES

MEMORANDUM OF ~~APPELLANTS~~ IN ~~OPPOSITION TO APPELLEES'~~ SUPPORT OF THEIR MOTION TO DISMISS THE WITHIN APPEALS AND IN OPPOSITION TO THE "APPELLEES'" MOTION TO REMAND TO THE DISTRICT COURT OR IN THE ALTERNATIVE TO GRANT THEIR PRIOR MOTION TO INTERVENE THEREIN

Appellees respectfully submit this memorandum of law and fact in support of their motion to dismiss the "appeals within "appeals", and in opposition to appellees' motions to remand these causes to the distroct court or, in the alternative, to grant their prior motion to intervene therein.

"Of Appellants"

The Facts

On June 19, 1967, the district court filed its Opinion, Findings of Fact and Conlcusions of Law in this case and ~~entered~~ duly entered and filed its judgment therein.

Subsequently and on or about July ____,
members of the
the Washington, D.C. School Board, defendants
below, ~~by a vote of ____ to ____~~, voted
7 to 2 not to appeal from said
judgment and or ~~re~~ruefully ordered
~~it's~~ ~~the~~ Superintendent of Schools Carl F.
Hansen, also a defendant below, in his official capacity likewise not
to appeal therefrom.

FP ~~Subsequent thereto and~~ On or about July 18, 1967, a group of parents of children allegedly in the ~~public~~/District of Columbia Public School System (hereinafter sometimes referred to as the Public School System), an alleged member of the teaching staff of the Public School System, and former Superintendent ~~of Schools of the Public School System~~ Hansen FN1 as an individual, ~~and a member of the School Board of the Public School System as an individual,~~ moved the court below pursuant to Rule 24, Federal Rules of Civil Procedure, for leave to intervene as parties defendant.

FN1 On ____, Hansen resigned his position effective July 31, 1967.

Benjamin Henley was immediately named acting Supt.

"for the purpose of noticing herein and prosecuting an appeal from the Judgment entered the 19th day of June, 1967." FN Moreover, ~~each~~ the prospective intervenors signified ~~his~~ their intention to prosecute an appeal to this Ct. from said judgment and asked the court below to "consider their motion as notice of appeal "effective as of the date of the filing thereof." FN

At the same time, former Superintendent Hansen, ~~as Sup in his~~ in his official capacity, and Carl C. Smuck, a dissenting member of the Board of Education, filed

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FN See ~~Not Motions to Intervene~~ first paragraph of the various motions to intervene.

FN See first paragraph of the various motions to intervene.

notice of appeal with the clerk
of the court below. On or about
July 28, 1967, ~~appellees~~ appellees
~~filed docketed the~~ the district court
~~court below~~ heard oral argument on ~~appellants'~~
the motion of ~~both~~ the appellants
~~the~~ who had moved to intervene
(=N)
below. Prior thereto, appellees
duly docketed ~~the~~ said record
with the clerk of this court and
moved to dismiss the ~~appeals~~ purported
~~paid the fee~~ ~~appeals fees~~
appeals.
~~Thereafter~~. Thereafter, three days later,
~~the~~ appellants filed a praecipe
with the ~~court below~~ the Clerk
(=N) ~~No decision on the said motion has~~
~~yet been rendered by the district court~~

In the said Hansen and Smith appeals

of the Court below directing him to transmit the entire record therein to the Clerk of this Court. FN

The motion of appellees to dismiss the appeals is currently pending in this Court. As the grounds therefor, appellees urged that:

1. All purported appellants except CARL F. HANSEN, as Superintendent of Schools of the District of Columbia, and CARL SMUCK, are not and were not parties to the action below;

2. All purported appellants lack sufficient standing to institute said appeals;

3. There is no case or controversy existing between appellees and these appellants or some of them;

4. The decree appealed from is not binding on these appellants or some of them;

5. The issues sought to be raised by the purported appeal are moot as to these appellants or some of them;

6. The issues sought to be reviewed by these appellants or some of them are insubstantial; and

7. The notices of appeal, or some of them, do not conform to the requirements of Rule 73 of the Federal Rules of Civil Procedure.

FN Appellees subsequently filed a supplemental [illegible] directing the district clerk to transmit to this Court (1) all [illegible] & instruments filed subsequent to June 19, 1967, [illegible] on Aug 24, 1967 (2) the [illegible] by [illegible] to said motions to [illegible]

On or about August 1, 1957, Hansen and Smuk as appellants filed in this Court their opposition to ~~the motion to~~ said appellees' motion to dismiss and moved to consolidate the Smuk appeal (No. 21107) with the Hansen appeal (No. 21168). At the same time, all appellants filed their opposition to the said motion to dismiss together with motion to remand the pending appeals to the district court for ruling on the motion to intervene still pending therein or, in the alternative,

for action by this court upon the said motions. Moreover, ~~all appellants~~ on or about August 7, 1967, all appellants moved this court to vacate the judgment and Order ~~of~~ of June 19, 1967 of this ~~District Court~~ court below and to remand the cause for ~~trial~~ trial thereof.

NOTICE OF APPEAL TO THE
SUPREME COURT OF THE UNITED STATES

I. Notice is hereby given that plaintiffs in the herein action, individually and as representative of all others similarly situated, hereby appeal to the Supreme Court of the United States from the order of this Court of February 9, 1967, denying plaintiffs' motion for summary judgment and granting the motion of defendant United States District Judges for the District of Columbia to dismiss Count 1 of the complaint herein.

This appeal is taken pursuant to 28 U.S.C. 1253.

II. The Clerk will please prepare a transcript of the record in this cause for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

(a) The complaint of the plaintiffs.

(b) The motion for convening of the three-judge statutory court.

(c) The order convening the three-judge statutory court.

(d) The answers of defendants.

(e) All affidavits filed by plaintiffs and defendants.

(f) The majority opinion of the District Court and the dissenting opinion of Circuit Judge Wright.

III. The following question is presented by this appeal: whether D.C. Code, §31-101 (1961 ed.) is facially violative of the Constitution of the United States and, in

particular, Articles I, II and III, thereof.

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I N D E X

TABLE OF CASES CITED

AUTHORITIES

STATUTES

28 U.S.C. §§ 1253,1344,2284

42 U.S.C. §1981 et seq., §§2000(c) et seq., 2000(d) et seq.

Constitution of the United States, Art.I, Sec.8, Clause 17; Art. II, Sec. 2, Clause 2; Art. III, Sec. 2, Clause 2

District of Columbia Code, §31-101 (1961 ed.)

Elementary and Secondary Education Act of 1965

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. _____

JULIUS W. HOBSON, individually and on behalf of JEAN MARIE HOBSON and JULIUS W. HOBSON, JR.; SAMUEL D. GRAHAM, individually and on behalf of BARBARA JEANE GRAHAM and KAREN CHANDELLE GRAHAM; MARY ALICE BROWN, individually and on behalf of CHARLES HUDSON BROWN; PAULINE SMITH, individually and on behalf of MAURICE HOOD; WILLIE DAVIS, JR., individually and on behalf of RONALD D. DAVIS, REGINALD D. DAVIS and MYOSHI J. DAVIS; JAMES K. WARD, individually and on behalf of CHRYCYNTHIA ELAIN WARD; JOYCE M. MAKEL, individually and on behalf of MICHELLE I. MAKEL; and CAROLYN HILL STEWART,

Plaintiffs-Appellants,

v.

CARL F. HANSEN, Superintendent of Schools of the District of Columbia, THE BOARD OF EDUCATION OF THE DISTRICT OF COLUMBIA, WESLEY S. WILLIAMS, President of the Board of Education of the District of Columbia, CARL SMUCK, EVERETT A. HEWLETT, WEST A. HAMILTON, LOUISE S. STEELE, EUPHEMIA L. HAYNES, GLORIA K. ROBERTS, PRESTON A. McLENDON, and IRVING B. YOCHELSON, members of the Board of Education of the District of Columbia, CHIEF JUDGE MATTHEW F. McGUIRE, SENIOR JUDGES JOSEPH L. JACKSON, HENRY A. SCHWEINHAUT, CHARLES S. McLAUGHLIN and DAVID A. PINE: and DISTRICT JUDGES ALEXANDER HOLTZOFF, RICHMOND B. KEECH, EDWARD M. CURRAN, BURNITA SHELTON MATTHEWS, LUTHER W. YOUNGDAHL, JOSEPH C. McGARRACHY, JOHN J. SIRICA, GEORGE L. HART, JR., LEONARD P. WALSH, WILLIAM B. JONES, SPOTTSWOOD W. ROBINSON, III, HOWARD S. CORCORAN, OLIVER GASCH, WILLIAM B. BRYANT, all of the United States District Court for the District of Columbia, THE BOARD OF ELECTIONS OF THE DISTRICT OF COLUMBIA, CHARLES H. MAYER (Chairman), ERNEST SCHEIN and DR. ROBERT EARL MARTIN, members of the Board of Elections of the District of Columbia,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

JURISDICTIONAL STATEMENT

A. The Opinions Below

The majority opinion of Circuit Judges Fahy and Miller is set forth in full as Appendix A to this Statement. The dis-

senting opinion of Circuit Judge Wright is set forth in full as Appendix B to this Statement.

B. Statement of the Grounds on which the Jurisdiction of this Court is Invoked

1. This is an appeal from the majority opinion and order of a statutory three-judge District Court denying a motion by Plaintiffs-Appellants (hereinafter referred to as Appellants) for summary judgment and granting a motion by Defendants-Appellees (hereinafter referred to as Appellees) to dismiss as to Count 1 of the complaint. On or about January 13, 1966 Appellants, pupils then all enrolled in the public schools of the District of Columbia and their guardians and next of friends, and a teacher employed in said school system, instituted a plenary federal action, pursuant to 42 U.S.C. 1981 et seq., §§ 2000(c) et seq., and §§ 2000(d) et seq.; and the Elementary and Secondary Education Act of 1965, seeking, insofar as the first cause of action in the complaint was concerned, a declaratory judgment that §31-101 of the District of Columbia Code was unconstitutional insofar as it purports to direct or does direct the nomination and appointment of the members of the Board of Education of the District of Columbia by the District Judges of the United States District Court for the District of Columbia, and a permanent injunction forever restraining said District Judges from executing, enforcing or administering so much of said statute as purportedly empowers them to nominate and appoint members of the said Board of Education.

On March 25, 1966, Circuit Judge Wright certified the necessity of convening a statutory three-judge court pursuant to the provisions of 28 U.S.C. 2284, to consider Appellants'

motion for summary judgment on the first cause of action set forth in the complaint and defendants' motion to dismiss same to the Chief Judge of the United States Court of Appeals for the District of Columbia Circuit. On March 29, 1966, a three-judge district court was duly convened by the Chief Judge of the said Court of Appeals "to hear and determine the first cause of action outlined in the complaint." A hearing was thereupon held by the three-judge district court on April 18, 1966 to consider arguments on Appellants' motion for summary judgment and Appellees' motion to dismiss insofar as the first cause of action was concerned.

On February 9, 1967, the majority of the district court entered an opinion and order denying Appellants' motion for summary judgment and granting that of Appellees to dismiss Count 1 of the complaint. After finding that all but two of Appellants had sufficient standing to question the validity of Section 31-101, the majority held that, under Article I, Section 8, clause 17 and Article II, Section 2, clause 2 of the Constitution of the United States, Congress was empowered to enact the statute in question.

Circuit Judge Wright, dissenting, would have found that Article II, Section 2, clause 2 was inapplicable to the appointment of members of the District of Columbia Board of Education because they "are not 'officers of the United States' within the sense of that Article."[1] Nevertheless, Judge Wright maintains, Article II "permits Congress to require a federal court to appoint only personnel meaningfully affiliated with the judiciary. Therefore, it affords no basis for §101."[2]

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1. Appendix B, p. 32a.
2. Appendix B, p. 42a.

Likewise, Judge Wright would have held that Article I, Section 8, clause 17 did not justify Section 101. In his view, reliance on Article I to support the duties imposed by Section 101 on the District Court "would seriously damage the integrity of this court derived from Article III."[3] He would have concluded that the District Courts had "full, unadulterated Article III status and independence equal to federal courts throughout the country. . ."[4]

2. The order sought to be reviewed is the order entered by the majority of the three-judge federal district court on February 9, 1967. A notice of appeal was duly filed with the Clerk of the United States District Court for the District of Columbia on March 1, 1967. An extension of time until May 30, 1967 to file this Jurisdictional Statement was duly entered by Circuit Judge Wright pursuant to Rule 13 of this Court.

3. Jurisdiction of this appeal is conferred on this Court by Title 28 U.S.C. 1253.

4. Cases sustaining the jurisdiction of this Court are: Marbury v. Madison, 5 U.S. (1 Cranch) 137; Matter of Hennen, 38 U.S. (13 Pet.) 230; Ex parte Siebold, 100 U.S. (10 Otto) 371; O'Donoghue v. United States, 289 U.S. 516; Glidden Co. v. Zdanok, 370 U.S. 530; National Mutual Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582.

5. The validity of D.C. Code §31-101 (1961 ed.) is here involved. The text of this Act of Congress is as follows:

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3. Appendix B, p. 50a.
4. Appendix B, p. 53a.

§31-101. Qualifications and appointment--Compensation--Secretary--Meetings-Members exempt from personal liability--Costs and supersedeas bond.

(a) The control of the public schools of the District of Columbia is hereby vested in a Board of Education to consist of nine members all of whom shall have been for five years immediately preceding their appointment bona fide residents of the District of Columbia and three of whom shall be women. The members of the Board of Education shall be appointed by the United States District Court judges of the District of Columbia for terms of three years each, and members shall be eligible for reappointment. The members shall serve without compensation. Vacancies for unexpired terms, caused by death, resignation, or otherwise, shall be filled by the judges of the United States District Court for the District of Columbia. The board shall appoint a secretary, who shall not be a member of the board, and they shall hold stated meetings at least once a month during the school year and such additional meetings as they may from time to time provide for. All meetings whatsoever of the board shall be open to the public, except committee meetings dealing with the appointment of teachers. The members of the Board of Education of the District of Columbia shall not be personally liable in damages for any official action of the said board performed in good faith in which the said members participate, nor shall any member of said board be liable for any costs that may be taxed against them or the board on account of any such official action by them as members of the said board; but such costs shall be charged to the District of Columbia and paid as other costs are paid in suits brought against the municipality; nor shall the said board or any of its members be required to give any supersedeas bond or security for costs or damages on any appeal whatever.

(b) The judges of the United States District Court for the District of Columbia shall have power to remove any member of the Board of Education at any time for adequate cause affecting his character and efficiency as a member, after a public hearing on a verified complaint filed by the United States Attorney for the District of Columbia, or one of his assistants, and on issues framed by a verified answer. The United States District Court of the District of Columbia is empowered to promulgate rules to carry out the purpose of this subsection. (June 20, 1906, 34 Stat. 316, ch. 3446, §2; Jan. 26, 1929, 45 Stat. 1139, ch. 105; June 25, 1936, 49 Stat. 1921, ch. 804; June 25, 1948, 62 Stat. 991, ch. 646, §32(b); May 24, 1949, 63 Stat. 107, ch. 139, §127; Aug. 2, 1957, 71 Stat. 341, Pub.L. 85-119, §1.)

C. Questions Presented by this Appeal

1. Whether Article II, Section 2, clause 2, of the Constitution of the United States permits Congress to require federal courts in general and the United States District Court for the District of Columbia in particular to appoint personnel other than that meaningfully affiliated with the judiciary?

2. Whether Article I, Section 8, clause 17 of the Constitution of the United States permits Congress to require the United States District Court for the District of Columbia or the judges thereof to perform non-judicial functions?

3. Whether D.C. Code §31-101 (1961 ed.) violates Article II, Section 2, clause 2 of the Constitution of the United States?

4. Whether Article III of the Constitution of the United States forecloses the assignment by Congress to the United States District Court for the District of Columbia of non-judicial duties?

5. Whether D.C. Code §31-101 (1961 ed.) violates the Doctrine of Separation of Powers?

6. Whether D.C. Code §31-101 (1961 ed.) violates the Due Process Clause of the Fifth Amendment to the Constitution of the United States?

7. Whether D.C. Code §31-101 (1961 ed.) offends fundamental public policy?

8. Whether the District Court erred in denying Appellants' motion for summary judgment and granting Appellees' motion to dismiss as to Count 1 of the complaint?

D. Statement of the Facts of the Case[5]

Since 1906, the year of the enactment of D.C. Code §31-101, the nine members of the Board of Education for the District of Columbia have been "appointed by the United States District Judges of the District of Columbia. . ." From 1906 to 1962, the Board "was carefully maintained at a formula of four white men, two white women, two Negro men and one Negro woman." (Washington Post, Potomac Section, "Choosing the District Board of Education", May 1, 1966) In the latter year, an additional Negro man was added, creating the present racial composition of five white and four Negro members.

In addition to its perpetual white majority,[6] the Board of Education is politically and geographically totally unrepresentative of the community it purports to serve.[7] Although the far northwestern corner of the District, west of 16th Street and north of Woodley Street, contains barely one-twentieth of its population, in May of 1966 five members of the Board lived in that area.[8] At the same time, the center

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5. Although the history, composition and characteristics of the District of Columbia School Board are not, strictly speaking, part of the record herein, they are, as incontrovertible public facts, entitled to judicial notice, and, in the opinion of counsel, provide an essential backdrop to the legal posture of the case.

6. See Washington Post, Potomac Section, supra; Washington Post editorial "Elect Them", Feb. 13, 1967.

7. In round percentages, 93% of the District's public school students is Negro as is 61% of its total population.

8. In addition, eight lived in high income neighborhoods, five were drawn from the one-sixth of the District's voters who are registered Republicans, and only one had a child in the public school system.

city had no representation at all.

Only in June of 1966 was there a significant change in the type of personnel selected by the district judges when a three-judge panel chaired by District Judge Bryant passed over all incumbents to nominate one Negro and two Caucasians, all in their early or middle forties.[9] Although this deviation was characterized by Chief Judge David L. Bazelon of the U. S. Court of Appeals for the District of Columbia as "a ray of light and hope",[10] it is not likely to be continued. The district judge in charge of screening candidates for board membership from 1960 to 1965,[11] and whose illness resulted in the temporary assignment of Judge Bryant, is now in the process of recommending three more appointees. It is highly probable that his selections will parallel those recommended by him in prior years.[12]

Perhaps the best appraisal of the present intolerable situation appeared on the editorial pages of the Washington Post on March 1, 1967. It reads as follows:

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9. The average age of the Board of Education is considerably higher.

10. Washington Post, June 28, 1966.

11. United States District Judge George L. Hart, Jr.

12. On April 26, 1967, the Washington Post characterized his method of choosing members of the Board of Education as "selection by whim". According to the Washington Star of April 25, 1967, "Hart also said that he will not make any attempt to establish a racial quota for board members despite growing demands that the board be composed of a majority of Negroes. . . . [he] said he will try to do something about distributing board members among the four sections of the city. But he said that this distribution would be affected 'only if we don't have to lower the quality of the board to do it.'" See also editorial, Washington Post, "The Judges' Choice," March 1, 1967.

THE JUDGES' CHOICE

The United States District Court seems to have no understanding of the damage that it has inflicted upon Washington's public schools. Judges ought never to be asked to appoint School Boards. But when the law requires it, as in Washington, the judges have a duty to exercise this great power with care. Instead, Chief Judge Curran has once again simply turned the job over to one judge, George L. Hart, on the basis of seniority alone.

Judge Hart controlled the appointments from 1960 to 1965. By 1966 the Board was a remarkably accurate reflection of Judge Hart's personal preferences. Judge Hart is a Republican; so were most of the Board members. He is white and upper middle class; so was most of the Board. He lives in upper northwest Washington; most of the Board lived west of 16th Street and north of Woodley Road, although 95 per cent of the city's school children live outside that pleasant area. Judge Hart had no children in the schools, and saw nothing wrong with the present policies of the school administration; the same was true of most of his School Board. Meanwhile, of course, the distance between the Board and the rest of the community steadily widened, the issues of policy became sharper, and public distrust of the schools deepened.

Last year Judge Hart was ill and another judge presided over the selection of Board members. There was a sharp change in the old pattern and this year the Board is no longer quite so isolated from reality as it has been in the past. But now Judge Hart is back in control of the process, and three of the Board's nine seats must be filled in June.

The President and Congress ought to realize that this eccentric procedure leaves the School Board, in political terms, in the hands of the Taft wing of the Republican Party, which in this city is neither numerous nor widely representative. But the immediate responsibility lies with the Federal judges. They themselves ought to ask Congress to relieve them of the wholly unjudicial burden of appointing the School Board. In the meantime, Judge Curran and his colleagues have an obligation to 148,000 public school children to see that this year's three appointments reflect more than Judge Hart's own predilections.

E. The Questions Presented are Serious and Substantial

I. The question of whether Congress may impose on any federal court duties totally unrelated to the judicial function requires immediate definitive determination by this Court.

(a) This Court has never conclusively adjudicated this issue.

The Appointments Clause of the Constitution, insofar as it provides that "Congress may by Law vest the Appointment of such inferior officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments"[13] (emphasis added), has never been definitively construed by this Court. Cf. Ex parte Siebold, 100 U.S. 371 and Matter of Hennen, 38 U.S. 230. Since both the majority and dissenting opinions below come to such radically differing conclusions as to the meaning of the provision, it is a matter of compelling urgency for this Court to resolve the existent dichotomy.

Circuit Judges Fahy and Miller hold that Article II does not limit the appointive power, insofar as federal judges are concerned to "only officers concerned with the administration of justice" (Appendix A, p. 15a). On the other hand, Circuit Judge Wright would have held that the provision in question "permits Congress to require a federal court to appoint only personnel meaningfully affiliated with the

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13. Mason's supplementary notes made during the Convention's proceedings sets forth the critical language as follows:

> In the President alone--in the Courts of Law, or in the Heads of Departments.

Farrand's The Records of the Federal Convention of 1787 (Yale Univ. Press, 1937), Vol. iv, p. 60. This would suggest a distinction between the President and other appointive authorities.

judiciary" (Appendix B, p. 42a).[14] These contradictions underscore the substantial and immediate need to settle this vital issue once and for all.

1. The Constitutional Convention of 1787

The Founding Fathers seem to have had no fears that their language in this regard was capable of two such widely varying constructions. Although they debated at great length the President's appointive powers,[15] the provision under scrutiny was not seriously questioned. In fact, it appears to have been a distinct afterthought,[16] having been proposed for the first time by Mr. Morris in the closing days of the Convention.[17] But the delegates were hardly confused about its precise meaning. Following Mr. Morris' motion, Mr. Madison objected that "it does not go far enough. . . . [S]uperior Officers below Heads of Departments ought in some cases to have the appointment of the lesser offices."[18] (emphasis added) The term "lesser", like that of "inferior", clearly meant officers directly subordinate to the appointing power. Corwin, The President: Office and Powers, 1787-1957,

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14. "Today is the first time a court has ever held that Congress may impose on this or any other federal court a duty so totally unrelated to the judicial function." (Appendix B, p. 32a.

15. See, for example, Farrand's Records of the Federal Convention of 1787, supra, Vol. II, pp. 398, 405-6.

16. Specific provisions of the Constitution had already dealt with officers of the Congress, viz. Art. I, Sec. 2, cl. 5 and Sec. 3, cl. 5.

17. Ibid. pp. 627-8.

18. Madison's suggestion was rejected by Morris on the ground that "There is no necessity. Blank commissions can be sent. . . ." Ibid. at 627.

75-76 (4th ed. 1957).

Although the provision was initially defeated by an "equal division" of votes, it was immediately resubmitted because "some such provision being too necessary, to be omitted". It was then carried, "nem. con."[19] Without a shadow of a doubt, the delegates were thinking only in terms of "necessary" appointments by "the Courts of Law, or . . . the Heads of Departments".[20]

The majority rely heavily on Mr. Justice Story's observation that "[I]n one age the appointment might be most proper in the President; and in another age, in a department". (Appendix A, p. 14a) Assuming, arguendo, that he meant the word "department" to include "courts of law", it is inconceivable that he would ever have regarded the appointment of school board members as "most proper" for the judiciary to perform. It is one thing to argue for flexibility insofar as the appointment power is concerned; it is quite another to say that Congress is free to award it wheresoever it sees fit, whether or not "there is no such incongruity in the duty required as to excuse the courts from its performance, or to render their acts void". Ex parte Siebold, supra, at 398.[20a]

2. The prior decisions of this Court

Putting aside the fact that members of District of

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19. Ibid., at 627-8.

20. In this connection, see Hart and Wechsler, The Federal Courts and the Federal System, 13-14. Significantly, the Federalist Papers, Mentor edition, 1961, makes no mention of this provision.

20a. Judge Wright's example of the selection of Head Start personnel by the district judges (Appendix B, p. 34a) hardly exhausts the range of "incongruous" appointments possible under the majority interpretation of Article II, §2, Clause 2. In the absence of judicial limitation, the lower court could be required to appoint anyone from dog-catcher to District Commissioner.

Columbia Boards are not "officers of the United States" within the sense of Article II,[21] it is clear from a literal reading of the clause at issue that school board members can hardly be classified as occupants of "lesser offices", or their appointment characterized as a "necessary" function of the "Courts of Law". This is precisely why this Court felt constrained to state in Matter of Hennen, supra, in upholding the appointment of a clerk by a Louisiana district court, that

> [T]he appointing power here designated in the latter part of the section [Art. II, Section 2, clause 2] was no doubt intended to be exercised by the department of the government to which the officer to be appointed most appropriately belonged. The appointment of clerks, of course, properly belongs to the courts of law; and that a clerk is one of the inferior officers contemplated by this provision in the Constitution cannot be questioned. 22/ (emphasis added) (at 257-258)

This Court's decision, forty years later, in Ex parte Siebold, supra, according to the majority below, "explicitly refutes such an interpretation of Hennen" (Appendix A, p. 15a) But as Circuit Judge Wright quite correctly points out, Siebold is scarcely a refutation of Hennen.[23] Although this Court stated, in passim, again

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21. Cf. Burnap v. United States, 252 U.S. 512; United States ex rel. Crow v. Mitchell, 67 App. D.C. 61; Ex parte Siebold, supra.

22. The Court reached this conclusion without any reference to the proceedings of the Constitutional Convention.

23. As he puts it, "The Court went on, however, to comment in somewhat puzzling language that Hennen had correctly expressed 'the law or rule by which it [Congress] should be governed' under Article II, and then volunteered that 'in the present case there is no such incongruity in the duty required as to excuse the courts from its performance, or to render their acts void' (Appendix B, p. 35a)

without any reference to the Convention of 1787, that "there is no absolute requirement . . . in the Constitution" that inferior officers be appointed by "the particular department in which the duties of such officers appertain" (at 396-7), it sustained the validity of the appointment of federal election supervisors pursuant to provisions of the Enforcement Act of 1870[24] because "there is no such incongruity in the duty required as to excuse the courts from its performance, or to render their acts void." (emphasis added)

> It cannot be affirmed that the appointment of the officers in question could, with any greater propriety, and certainly not with equal regard to convenience, have been assigned to any other depositary of official power capable of exercising it. Neither the President, nor any head of department, could have been equally competent to the task.
>
> (at 398)

The judicial nature of the supervisors of elections created by the Enforcement Act has been clearly designated by Circuit Judge Wright in Footnote 6 to his dissenting opinion.[25]

However, when the entire Title of the Revised Statutes ("The Elective Franchise") is studied, it becomes quite clear that the Court was dealing with a case that fell squarely within Hennen. Unfortunately, the Court's opinion in Siebold leaves the impression that supervisors of elections were federal officials with broad, far-ranging powers of general supervision and control. Nothing could be further from the truth; indeed, the "supervisor" of elections was empowered to do just what the root Latin means, "look over"

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24. Partially codified as Title XXVI, §§ 2002-2031 of the Revised Statutes (2d ed. 1878).

25. See also Rice v. Ames, 180 U.S. 371, sustaining the power of Congress to appoint United States Commissioners in extradition cases.

and nothing more.

The Enforcement Act election provisions were based upon the concept of judicial resolution of contested elections. Sec. 2010, which was not cited in Siebold, gave the circuit courts the jurisdiction to decide the title to offices other than those of Presidential Electors, Members of the House, and state legislators[26] when the denial of the right to vote on account of race infected the result of the election. The statute, which appears today as 28 U.S.C. 1344, cites the 15th Amendment as its direct authority. Moreover, the powers to adjudicate contested elections involving Presidential Electors and Members of the House were already constitutionally

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26. Sec. 2010. Whenever any person is defeated or deprived of his election to any office, except elector of President or Vice-President, Representative or Delegate in Congress, or member of a State legislature, by reason of the denial to any citizen who may offer to vote, of the right to vote, on account of race, color, or previous condition of servitude, his right to hold and enjoy such office, and the emoluments thereof, shall not be impowered by such denial; and the person so defeated or deprived may bring any appropriate suit or proceeding to recover possession of such office, and in cases where it appears that the sole question touching the title to such office arises out of the denial of the right to vote to citizens who so offered to vote, on account of race, color, or previous condition of servitude, such suit or proceeding may be instituted in the circuit court or district court of the United States of the circuit or district in which such person resides. And the circuit or district court shall have, concurrently with the State courts, jurisdiction thereof, so far as to determine the rights of the parties to such office by reason of the denial of the right guaranteed by the fourteenth article of amendment to the Constitution of the United States and secured therein.

This presently almost never-used statute was the basis (as amended by the "technical" revisions of June 25, 1948, to include the United States Senate) for the now famous litigation in the Fifth Circuit contesting then United States Senator-elect Lyndon Johnson's election in 1948. (Johnson v. Stevenson, 170 F. 2d 108 (C.A. Tex., 1948)). The Court held the statute inapplicable by its own terms, since United States Senators were explicitly excepted, and dismissed the litigation.

vested in the Congress and in the House.[27] But even here, the contested elections statutes governing House elections[28] vested the federal judiciary with authority to preside over the taking of depositions, an authority in aid of the power of Congress to adjudicate these matters.[29]

In essence, then, the Enforcement Act funneled election contests into the federal judiciary as the enforcement agency for the 15th Amendment's protection of the right to vote regardless of race. Seen in this light, it becomes clear that the supervisors were at the least ancillary to the judicial process. But this analysis just scratches the surface of their full judicial nature.

The Chief Supervisor for the judicial district is appointed by the circuit judge from among his circuit court commissioners. (Sec. 2025) In addition to the supervision of his subordinates his function is solely to inform the court. (Sec. 2026). The individual supervisors are appointed by the circuit judge, two for each precinct, on a petition filed by either two citizens or a municipality or by ten citizens of a county. (Sec. 2011) The court may at any time modify, change, or alter the appointment of the supervisors. (Sec. 2012) In Congressional election matters, the Chief Supervisor[30] also files all materials with the House of

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27. Art. I, Sec. 5, Cl.1, and Sec. 8, Cl. 18, U. S. Constitution; and the 17th Amendment was yet to be adopted.

28. Title II, Ch. 8 of the Revised Statutes; now codified as 2 U.S.C. 201-226.

29. Ibid., Sec. 110; now codified as 2 U.S.C., 206.

30. Appointed by the circuit court from among its commissioners (Sec. 2025) to report directly to the court (Sec. 2026).

Representatives,[31] as well as with the court under his direct responsibility. Finally, Sec. 2029 reads:

> Sec. 2029. The Supervisors of election appointed for any county or parish in any Congressional District, at the instance of 10 citizens, as provided in Sec. two thousand and eleven, shall have no authority to make arrests, or to perform other duties than to be in the immediate presence of the officers holding the election and to witness all their proceedings, including the counting of the votes and making of a return thereof.

Parenthetically, it should be added that Sec. 2021[32] creates the office of special deputy marshal, appointed by the U. S. Marshal for each precinct in such numbers as to protect the election supervisors in the performance of their duties. In essence, Congress recognized clearly in the Enforcement Act itself the proper and appropriate lines of appointment for the functions it had created. As to the election supervisors, it seems quite obvious that they lacked even the authority of most special masters in the present federal practice, though perhaps this denomination would best describe them.

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31. Sec. 2020. . . . [P]rior to the assembling of the Congress for which any such Representative or Delegate was voted for he shall file with the Clerk of the House of Representatives all the evidence by him taken, all information by him obtained, and all reports to him made.

32. Sec. 2021. Whenever an election at which Representatives or Delegates in Congress are to be chosen is held in any city or town of twenty thousand inhabitants or upward, the marshal for the district in which the city or town is situated shall, on the application, in writing, of at least two citizens residing in such city or town, appoint special deputy marshals, whose duty it shall be, when required thereto, to aid and assist the supervisors of election in the verification of any list of persons who may have registered or voted; to attend in each election district or voting precinct at the times and places fixed for the registration of voters, and at all times and places when and where the registration may by law be scrutinized, and the names of registered voters be marked for challenge; and also to attend, at all times for holding elections, the polls in such district or precinct.

It is obvious that Hennen and Siebold, the only significant pronouncements by this Court of the scope of the pertinent appointment power, leave much to be desired as present-day constitutional guideposts. This Court has not, for almost a century, considered the question at issue and what direction we have is contained, as Circuit Judge Wright points out, in "conflicting and ambiguous language in 19th century cases. . ." which he feels "should not preclude this Court [the district court] from making its independent evaluation of Article II, with the guidance of those cognate doctrines whose print is felt throughout our constitutional structure." (Appendix B, p. 36a)

3. Congressional acquiescence

Three of the handful of statutes cited by the majority below[33] as evidence of the validity of its interpretation of Article II, clearly relate to the judicial appointment of what Circuit Judge Wright refers to as "court-related personnel" (Appendix B, p. 36a). The only exceptions are the Siebold statute[34] and §31-101. As Judge Wright puts it, "[T]o advance §101 as manifesting an ingrained congressional view that statutes like §101 are constitutional is a wondrous instance of bootstrapping."

> Rather, if historic congressional practice is germane to the constitutional question, it impressively supports the narrower construction of Article II; for, apart from §101 and passing by the supervisors with moot status in Siebold, we are cited no instances, past or present, in which Congress found it necessary or proper to impose on federal courts the

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33. D.C. Code §§ 11-1401, 21-502, 2-2204, 23-401, 31-101.

34. This statute was repealed in 1894. 28 Stat. 36.

> responsibility for appointing federal officials whose duties are unconnected with the judicial function. This tradition in Congress is in exact harmony with the insistent doctrine of our law, articulated by Article III and constitutional history, that the federal judiciary refrain from indulging in nonjudicial activities. This doctrine and the policies encircling it should be instrumental in resolving whatever ambiguity inheres in Article II.
>
> (Appendix B, p. 36a)

In this connection, the Court's attention is respectfully called to the legislative history of §31-101. As originally reported out of the House committee, the bill (H.R. 18442), provided for appointment of the Board of Education by the District Commissioners. Mr. Foster of Vermont offered an amendment from the floor to substitute the "Supreme Court judges of the District of Columbia" for the District Commissioners as the appointing authority.[35] Intermittent discussion ensued as to the merits of alternative means of appointment, including that by the President, and of elections. But no constitutional question was raised prior to the vote adopting Foster's amendment. Immediately after the vote Mr. Gilbert rose for the following dialogue:

> Mr. GILBERT of Kentucky. Mr. Chairman, before that question was put to the house I was clamoring to be heard in opposition to it.
>
> The CHAIRMAN. The Chair begs the pardon of the gentleman.
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> . . .

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35. Significantly, Foster's objective in proposing his amendment was "to have a change for better in the board . . . to provide for an absolute divorce of the school system from the rest of the municipal government." (Congressional Record, 59th Congress, 1st Session, pp. 5755-6) But during the debate, he emphasized that the method he favored for the selection of school board members was "election by the sovereign people . . . I think that we must in the end return to that system in the District of Columbia." (Ibid, p. 5758)

Mr. GILBERT of Kentucky. . . . I just wanted to remind the committee that this bill, in my judgment, is clearly in violation of the Constitution. We had precisely a similar piece of legislation enacted by the legislature of Kentucky, conferring upon the court of appeals of Kentucky authority to appoint three commissioners like these. The court of appeals refused to exercise the function, refused to enforce that piece of legislation, and took the position that under the Constitution you could not thrust upon a judicial tribunal any legislative or executive function. The supreme court of the District of Columbia will say, "You are undertaking to load us up with certain nonjudicial duties, certain legislative and executive functions which do not harmonize with the duties of the Court, and we will refuse to execute this statute.

Mr. KEIFER. Was not the decision the gentleman refers to a decision based on the provisions of the constitution of a state?

Mr. GILBERT of Kentucky. Of course, but that provision pervades the Constitution of the United States and separates the legislative, the executive, and the judicial function.

Mr. KEIFER. I think we have had a similar decision in Ohio to the one the gentleman cites, but it was because of the peculiar language of the constitution of the State of Ohio. I am not familiar with the case in Kentucky.

Mr. GILBERT of Kentucky. It occurred to me that this same provision existed in substantially all the constitutions, the power to appoint the school officers creating a function that was not judicial in its character.

Mr. GARRETT. If the gentleman will permit me, a parallel case where the Supreme Court of the United States held in the early days of the Republic, when there was an act of Congress requiring of those judges that they perform certain duties, as I remember it, in pension claims ----

Mr. GILBERT of Kentucky. Yes.

Mr. GARRETT. Of the Revolutionary War.

Mr. GILBERT of Kentucky. And they refused.

Mr. GARRETT. And they refused.

Mr. GILBERT of Kentucky. The same doctrine has been announced by the Supreme Court of the United States, by the supreme court of Ohio, and by numerous other supreme courts, and I take it the statute will be null and void if it is enacted. That is all I have to say. 36/

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36. Ibid.,pp. 5754-5764.

Mr. Gilbert's serious doubt is still pervasive and Congress has refrained from enacting any parallel "incongruity" to §31-101.[37]

II. The Decision Below Seriously Undermines Article III.

Although the majority below sees no threat to Article III[38] by its sanctification of the clearly nonjudicial duties[39] impressed upon the district court, Circuit Judge Wright quite correctly understands "that attention to extrajudicial activities is an unwanted diversion from what ought to be the judge's exclusive focus and commitment: deciding cases" (Appendix B, p. 38a). The majority justifies its conclusion by steadfast reliance on Congress' "plenary legislative power over the District" pursuant to Article I, Section 8, Clause 17

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37. The majority's references to D.C. Code 11-1401 (appointment of jury commissioners); D.C. Code 19-401 (appointment of Register of Wills); D.C. Code 21-502 (appointment of members of the Mental Health Commission); and 28 U.S.C. 631, 506 and 545 (appointment of U.S. Commissioners, interim U.S. Attorneys and interim U.S. Marshals are hardly supportive of §101. All of the above personnel perform functions related to the judicial process.

38. "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. . . The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;--to all Cases affecting Ambassadors, other public Ministers and Consuls;--to all Cases of admiralty and maritime Jurisdiction;--to Controversies to which the United States shall be a Party;--to Controversies between two or more States; between a State and Citizens of another State;--between Citizens of different States;--between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."

39. Appellees concede that only nonjudicial duties are performed by members of the School Board (Par. 7, p. 5 of Answer).

of the Constitution.[40] Absent the latter, it is beyond cavil that the duties imposed by §31-101 would be clearly beyond the constitutional power of the Congress to impose upon any federal court. See Murray v. Hoboken Land & Improvement Co., 18 How. 272; Tutun v. United States,[41] 270 U.S. 568.

To a large extent, the controlling nature of Article III on the district court[42] is dependent on the purported

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40. "The Congress shall have power . . . [T]o exercise exclusive Legislation in all Cases whatsoever over such District. . . as may by Cession of Particular States, and the Acceptance of Congress, become the seat of the Government of the United States. . ."

41. In Tutun, which raised the issue of the constitutionality of circuit court of appeal jurisdiction of naturalization proceedings, Mr. Justice Brandeis, speaking for the Court, stated:

> The function of admitting to citizenship has been conferred exclusively upon courts continuously since the foundation of our government. See Act of March 26, 1790, chap. 3, 1 Stat. at L. 103. The Federal district courts, among others, have performed that function since the Act of January 29, 1795, chap. 20, 1 Stat. at L. 414. The constitutionality of this exercise of jurisdiction has never been questioned. If the proceeding were not a case or controversy within the meaning of art. 3, §2, this delegation of power upon the courts would have been invalid. Hayburn's Case, 2 Dall. 409, 1 L. ed. 436; United States v. Ferreira, 13 How. 40, 14 L. ed. 42; Muskrat v. United States, 219 U.S. 346, 55 L. ed. 246, 31 Sup. Ct. Rep. 250. Whether a proceeding which results in a grant is a judicial one, does not depend upon the nature of the thing granted, but upon the nature of the proceeding which Congress has provided for securing the grant. The United States may create rights in individuals against itself, and provide only an administrative remedy. United States v. Babcock, 250 U.S. 328, 331, 63 L. ed. 1011, 1012, 39 Sup. Ct. Rep. 464. (at p. 576)

Parenthetically, the statute invalidated in Muskrat, supra, was a product of the same Congress that enacted 31-101.

42. "The restriction [Art. III] expresses as well the Framers' desire to safeguard the independence of judicial functions from the other branches by confining its activities to 'cases of a Judiciary nature', see II Farrand, op. cit., supra, at 430 . . ." Glidden Co. v. Zdanok, 370 U.S. 530, 582.

legislative-constitutional status of this Court. The judicial uncertainty as to the appointive powers of "Courts of Law" is equally apparent in this area. Cf. In re Macfarland, 30 App. D.C. 365, appeal dismissed, 215 U.S. 614; Keller v. Potomac Electric Power Co., 261 U.S. 428; Postum Cereal Co. v. California Fig Nut Co., 272 U.S. 693; Federal Radio Commission v. General Electric Co., 281 U.S. 464; O'Donoghue v. United States, 289 U.S. 516; National Mutual Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582; and Glidden Co. v. Zdanok, 370 U.S. 530.[43]

In the last cited case, this Court removed the Court of Claims and the Court of Customs and Patent Appeals from all incidents of Article I jurisdiction. As Mr. Justice Harlan put it:

> The restraints of federalism are, of course, removed from the powers exercisable by Congress within the District. For, as the Court early stated, in Kendall v. United States (US) 12 Pet 524, 619, 9 L ed 1181, 1218:
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> "There is in this district, no division of powers between the general and state governments. Congress has the entire control over the district for every purpose of government; and it is reasonable to suppose, that in organizing a judicial department here, all judicial power necessary for the purposes of government would be vested in the courts of justice."
>
> Thus those limitations implicit in the rubric "case or controversy" that spring from the Framers' anxiety not to intrude unduly upon the general jurisdiction of state courts, see Madison's Notes of the Debates, in II Farrand, Records of the Federal Convention (1911), 45-46, need have no application in the District. The national courts here may, consistently with those limitations, perform any of the local functions elsewhere performed by state courts.
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> But those are not the only limitations embodied in

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43. See also Notes, 58 Nw. U.L. Rev. 401 (1964); 38 N.Y.U.L. Rev. 302 (1963); 62 Col. L. Rev. 132, 139-142, 151-154 (1962).

> Article 3's restriction of judicial power to cases or controversies. The restriction expresses as well the Framers' desire to safeguard the independence of the judicial from the other branches by confining its activities to "cases of a Judiciary nature," see II Farrand, op cit., supra, at 430, and in this respect it remains fully applicable at least to courts invested with jurisdiction solely over matters of national import. Our question is whether the independence of either the Court of Claims or the Court of Customs and Patent Appeals has been so compromised by its investiture with the particular heads of jurisdiction described above as to destroy its eligibility for recognition as an Article 3 court.
>
> (at 581)

Significantly, Footnote 54[44], in passim, pointed out the "probable" source of the "appointive authority" of the district judges with reference to §31-101. This authority, Mr. Justice Harlan speculated, "is probably traceable to art. 2, §2 of the Constitution" (at 581). But, of infinitely more consequence to the issues here is the Court's recognition of the pragmatic necessity for the courts of the District of Columbia to "perform any of the local functions elsewhere performed by state courts." (at 581) Specific reference was made to probate and divorce proceedings -- the "inoffensive

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44. 54. The DC Code, 1961, Tit 11, c 5, establishes a special term of the United States District Court as a probate court, whereas the other Federal District Courts have been debarred from exercising such a jurisdiction as one traditionally within the domain of the States. Byers v McAuley, 149 US 608, 619, 37 L ed 867, 872, 13 S Ct 906. Similarly, the divorce proceedings maintainable under the general jurisdictional grant, DC Code §11-306; see Bottomley v Bottomley, 104 App DC 311, 262 F2d 23, are beyond the ken of the federal courts in the States. Ohio ex rel. Popovici v Agler, 280 US 379, 383, 74 L ed 489, 496, 50 S Ct 154.

> The appointing authority given judges of the District Court to select members of the Board of Education and of the Commission on Mental Health, DC Code, §§ 31-101, 21-308, is probably traceable to Art 2, § 2 of the Constitution. See note 10, supra; Ex parte Siebold, 100 US 371, 397, 398, 25 L ed 717, 726. (emphasis supplied)

ways in which District of Columbia federal courts are undeniabily unique within the federal judicial system".[45]

Because of the peculiar nature of the District of Columbia where there is "no division of powers between the general and state governments,"[46] it is difficult to fault the assignment of probate and divorce responsibilities to the district court. These functions, which are, of course, wholly judicial in nature, must be performed if society's needs are to be met. In the absence of suitable "inferior courts" within the District, such functions may, logically and legally, be performed by the district court. True, they would be barred to other federal district courts by the "case or controversy" rubric[47] but they do not, on the other hand, authorize the performance of totally nonjudicial duties as suggested by the majority below.[48]

What Glidden does strongly suggest is that such features as divorce and probate proceedings "define the outermost limits of the extraordinary limits of the District federal courts; the urgent need to occupy what would otherwise be a judicial vacuum hardly licenses this court to accept functions in no sense legitimately judicial."[49] Judge Wright sees the

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45. Dissenting opinion, Circuit Judge Wright, Appendix B, p.47a.

46. Glidden Co. v. Zdanok, supra. at 581.

47. Glidden Co. v. Zdanok, supra, at 581.

48. Hart and Wechsler pointedly pose the question: "Is there any satisfactory explanation of why a fusion of judicial and non-judicial functions in the same tribunal is objectionable in constitutional courts outside the District of Columbia but not in inferior constitutional courts inside it?", The Federal Courts and the Federal System, supra, at 349.

49. Dissenting opinion, Circuit Judge Wright, Appendix B, p. 48a.

fundamental issue quite clearly when he legitimately complains that

> The federal courts in the District of Columbia have long labored under the depressing psychology of the old line of cases. Just when it appeared that, with the help of the Supreme Court, we would soon gain recognition of full unadulterated Article III status and independence equal to federal courts throughout the country, today's decision turns back the clock in holding that, after all, we are still vassals of the Congress. 50/

The uncertain state of the law from Macfarland to Zdanok calls for prompt and definitive resolution by this Court which is the only forum capable of doing so. Otherwise, the uncertainties created by this line of cases, and emphasized by this Court's deep division in Glidden, will continue to plague the District's federal courts. It is one thing to accept the sui generis nature of the latter -- it is quite another to maintain that they may therefore be validly constituted as convenient dumping grounds for those unrelated but highly necessary functions of government that, concededly, "may place the judges in an unenviable position, and increase the unwelcomeness of their responsibility."[51] Only by this Court's action can the clock be set right again.

III. The Decision Below is Contrary to the Doctrine of Separation of Powers.

Putting aside all other considerations, it is obvious that the duties imposed by §31-101 upon the district judges violate the concept of separation of powers. As this Court has already stated:

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50. Appendix B, p. 54a. Cf. United States ex rel Brookfield Construction Co. v. Stewart, 234 F. Supp. 94, 98, aff'd 339 F. 2d 753.

51. Majority opinion of Circuit Judges Fahy and Miller, Appendix A, p. 28a.

> The Constitution allots the nation's judicial power to the federal courts. Unless these courts respect the limits of that unique authority, they intrude upon powers vested in the legislative or executive branches. Judicial adherence to the doctrine of the separation of powers preserves the courts for the decision of issues between litigants, capable of effective determination.
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> United Public Workers of America (CIO) v. Mitchell, 330 U.S. 75, 90.

In this connection, see U.S. v. Carrollo, 30 F. Supp. 3 in which the District Court for the Western District of Missouri held that federal district courts could not constitutionally be required to certify to the Secretary of Labor the advisability of deporting certain aliens.[52]

In I.C.C. v. Brimson, 154 U.S. 447, this Court upheld §12 of the Interstate Commerce Act which authorized the Interstate Commerce Commission to seek judicial enforcement of its subpoena duces tecum, which had been challenged as an assignment of nonjudicial functions in violation of the separation of powers doctrine. This Court, after reviewing its earlier cases on the question at issue, stated:

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52. The statute, as set forth by the court follows:

> Section 155 of Title 8, U.S.C.A. provides as follows:
> Sec. 155. Deportation within certain times of aliens entering or found in the United States in violation of law. . .
>
> The provision of this section respecting the deportation of aliens convicted of a crime involving moral turpitude shall not apply to one who has been pardoned, nor shall such deportation be made or directed if the court or judge thereof, sentencing such alien for such crime, shall, at the time of imposing judgment or passing sentence or within thirty days thereafter, due notice having first been given to representatives of the State, make a recommendation to the Secretary of Labor that such alien shall not be deported in pursuance of this subchapter * * * (at 51)

> The views we have expressed in the present case are not inconsistent with anything said or decided in those cases. They do not, in any manner, infringe upon the statutory doctrine that Congress (excluding the special cases provided for in the Constitution, as, for instance, in section two of article two of that instrument) 53/ may not impose upon the courts of the United States any duties not strictly judicial. 54/ (at 485)

Cf. Prentis v. Atlantic Coastline Company, 211 U.S. 210;

Dreyer v. Illinois, 187 U.S. 71.

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53. This example used by the Court probably is in reference to the appointment power provision at issue in this case. Like the oblique reference in Zdanok, supra, it is unclear and obiter.

54. Mr. Justice Harlan, for the Court, continues (at p. 485):

> The duties assigned to the Circuit Courts of the United States by the twelfth section of the Interstate Commerce Act are judicial in their nature. The inquiry whether a witness before the Commission is bound to answer a particular question propounded to him, or to produce books, papers, etc., in his possession and called for by that body, is one that cannot be committed for final determination. Such a body could not, under our system of government, and consistently with due process of law, be invested with authority to compel obedience to its orders by a judgment of fine or imprisonment. . . (p.487). One of the functions of a court is to compel a party to perform a duty which the law requires at his hands. If it be adjudged that the defendants are, in law, obliged to do what they have refused to do, that determination will not be merely ancillary and advisory, but, in the words of Sanborn's case, will be a 'final and indisputable basis of action', as between the Commission and the defendants, and will furnish a precedent in all similar cases. It will be as much a judgment that may be carried into effect by judicial process as one for money, or for the recovery of property, or a judgment in mandamus commanding the performance of an act or duty which the law requires to be performed, or a judgment prohibiting the doing of something the law will not sanction. It is none the less the judgment of a judicial tribunal dealing with questions judicial in their nature, and presented in the customary forms of judicial proceedings, because its effect may be to aid an administrative or executive body in the performance of duties legally imposed on it by the Congress in executive of a power granted by the Constitution.

IV. The Decision Below Violates the Concept of Due Process of Law.

It cannot be gainsaid that §31-101 makes the court below an important participant in the administration of the public school system of the District of Columbia. It is responsible for the appointment and, if required, the removal of the members of the Board of Education.[55] Yet, at the same time, it is the tribunal in which litigation directly affecting the actions of its board appointees must be tried. As Circuit Judge Wright puts it, "That section [31-101] raises . . . the unbecoming spectre of federal judges passing on the legality of acts of their appointees[56] in suits brought by District citizens pressing federal rights, including the constitutional right to equal opportunity".[57]

In Tumey v. Ohio, 273 U.S. 510, this Court strongly stressed the fact that due process was offended by a statute which gave a percentage of the fines recovered in an Ohio mayor's Police Court to himself and his municipality. Chief Justice

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55. These removal duties, as well as the relatively short terms of the Board members, even more increase executive control by the district judges over the Board of Education.

> 56. [A] legislative act which should undertake to make a judge the arbiter in his own controversies would be void, because, though in form a provision for the exercise of judicial power, in substance it would be the creation of an arbitrary and irresponsible authority, neither legislative, executive, nor judicial, and wholly unknown to constitutional government.

1 Cooley, Constitutional Limitations 356 (8th ed. 1927).

57. Appendix B, p. 50a. This "unbecoming spectre" was avoided below only because the fact that all of the district judges were nominal defendants necessitated the designation of a circuit judge to conduct the trial of Counts 2-6.

Taft, in invalidating the statute in question as violative of the Due Process Clause of the Fourteenth Amendment, stated that

> A situation in which an official perforce occupies two practically and seriously inconsistent positions, one partisan and the other judicial, necessarily involves a lack of due process of law in the trial of defendants charged with crimes before him. 58/
>
> (at 534)

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58. The state's attorney advanced the proposition that a state legislature had complete sweep in establishing its court system. The Chief Justice answered this argument as follows:

> Counsel for the State argue that it has been decided by this Court that the legislature of a State may provide such system of courts as it chooses; that there is nothing in the Fourteenth Amendment that requires a jury trial for any offender; that it may give such territorial jurisdiction to its courts as it sees fit; and therefore that there is nothing sinister or constitutionally invalid in giving to a village mayor the jurisdiction of a justice of peace to try misdemeanors committed anywhere in the county, even though the mayor presides over a village of 1,100 people and exercises jurisdiction over offenses committed in a county of 500,000. This is true and is established by the decisions of this Court in Missouri v. Lewis, 101 U.S. 22, 30; In re Claasen, 140 U.S. 200. See also Carey v. State, 70 Ohio State 121. It is also correctly pointed out that it is completely within the power of the legislature to dispose of the fines collected in criminal cases as it will, and it may therefore divide the fines as it does here, one-half to the State and one-half to the village by whose mayor they are imposed and collected. It is further said with truth that the legislature of a State may, and often ought to, stimulate prosecutions for crime by offering to those who shall initiate and carry on such prosecutions rewards for thus acting in the interest of the State and the people. The legislature may offer rewards or a percentage of the recovery to informers. United States v. Murphy & Morgan, 16 Pet. 203. It may authorize the employment of detectives. But these principles do not at all effect the question of whether the State by the operation of the statutes we have considered has not vested the judicial power in one who by reason of his interest both as an individual and as chief executive of the village, is disqualified to exercise it in the trial of the defendant. (emphasis supplied)
>
> (at 534-5)

Mr. Justice Black put it even stronger in In re Murchison, 349 U.S. 133, when he voided, on the same grounds, a Michigan statute which authorized state court judges to sit first as "one-man grand juries" and then as trial judges. In his words:

> The question now before us is whether a contempt proceeding conducted in accordance with these standards complies with the due process requirement of an impartial tribunal where the same judge presiding at the contempt hearing had also served as the 'one-man grand jury' out of which the contempt charges arose. . . .
>
> A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered. This Court has said, however, that "every procedure which would offer a possible temptation to the average man as judge . . . not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law." Tumey v. Ohio . . . . Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between the contending parties. But to perform its high function in the best way, 'justice must satisfy the appearance of justice.' Offutt v. United States, 348 U.S. 11, 99 L. ed. 11, 75 S. Ct. 11 (at 135-6) 59/ (emphasis supplied)

V. The Decision Below Violates Fundamental Public Policy.

As Circuit Judge Wright fully establishes, not only does §31-101 "seriously damage the integrity of this court

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59. It would seem that the appointment power phrase in Article 2, Section 2, Clause 2, of the Constitution should not be so construed as to produce violations of both the Due Process clause of the Fifth Amendment and the constitutional doctrine of Separation of Powers, as expressed in an independent judiciary, as well as the entire spirit underlying the Constitution. See also Commissioner of Internal Revenue v. Liberty Bank and Trust Company, 59 F. 2d 320, 323.

derived from Article III" but it is "an unwanted diversion from what ought to be a judge's exclusive focus and commitment: deciding cases".[60] On both counts, "public confidence in the judiciary [which] is indispensable to the rule of law"[61] is seriously (and needlessly) undermined. Undoubtedly, this fear is reflected by the fact that a significant number of states have express constitutional provisions or appropriate decisions by their highest courts, or, in some instances, both, prohibiting their legislatures from placing non-judicial functions, including the appointment of executive officers, on the judiciary.[62]

Moreover, the requirements of 101 necessitate the time and attention of federal district judges who must screen and recommend prospective appointees to the full bench below.[63] This year, with more than 50 nominees, the district judge burdened with the screening responsibility reported on May 14, 1967, that he "might not be able to interview every candidate and that those submitted before April 15 would have priority."[64] Parenthetically, while he stated that, in his opinion, 101 was constitutional, he felt that school board appointments "are

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60. Appendix B, p. 38a.

61. Ibid., p. 38a.

62. Alaska, Ariz., Cal., Colo., Conn., Ga., Hawaii, Iowa, Mont., Neb., Nev., N.J., N.M., N.Y., N.C., N.D., Ohio, Okla., Ore., R.I., Tenn., Tex., Utah, Vt., Va., W. Va., Wisc., Wyo.

63. "The policy is to conserve the time of the judges for the performance of their work as judges, and to save them from the entanglements, at times the partisan suspicions, so often the result of other and conflicting duties." (Cardozo, Ch.J., in Matter of Richardson, 247 N.Y. 401, 160 N.E. 655, 661 (1928).)

64. Washington Post, May 14, 1967, p. F1.

not a proper function of this court."[65]

It would serve no useful purpose to consider in full all of the side effects of "a constitutional construction so instinctively hostile to American constitutional tradition".[66] The usurpation of the time of district judges, their lack of "special competence" in disposing of the non-judicial duties imposed upon them by 31-101 and their necessary involvement in complex and often highly controversial socio-political issues, to name but a few, deserve weighty consideration. Circuit Judge Wright has put this aspect in sharp focus when he stated:

> Those hazards inhering in judicial acceptance of extrajudicial occupations have then been realized quite fully within the District Court's experience under §101. In some measure, further, the hazards will recur whenever federal courts are told to appoint government administrators whose work is not connected with the judiciary; and, while the measure may vary, the evils will seldom be de minimis. 67/

There are no "practical considerations" to justify the "sacrifice of Article III principles"[68] decried by Judge Wright. Not only is it now widely felt that federal judges should not accept voluntary non-judicial assignments except in situations of the most compelling public necessity, but with the exception of 101, Congress has wisely refrained from compelling them to undertake statutory duties totally uncon-

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65. The Washington Star, April 25, 1967. He went on to add: "In recent years the appointments have become a very political matter. It doesn't make any difference who is chosen, there is always a hue and cry about them. This reflects badly on the courts."

66. Dissenting opinion, Circuit Judge Wright, Appendix B, p. 34a.

67. Appendix B, p. 41a.

68. Appendix B, p. 41a.

nected with any aspect of their judicial work.[69]

As Chief Justice Stone reminded President Roosevelt, when a judge accepts executive duties "[he] exposes himself to attack and indeed invites it, which because of his peculiar situation inevitably impairs his value as a judge and the appropriate influence of his office."[70] True, there may be, and have been, "practical considerations" of the most compelling necessity for deviations from this desideratum, but, as Circuit Judge Wright reminds us, "solely executive tasks" must be declined "when there is firm reason to believe that their execution would seriously damage the integrity of this Court derived from Article III."[71]

CONCLUSION

Appellants respectfully request that the majority order of the three-judge statutory court denying the motion of appellants for summary judgment and granting that of appellees to dismiss insofar as Count 1 of the complaint is

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69. It is also relevant to notice the existing instances of placement of extra-judicial duties on judges. 20 U.S.C. 42 provides that the Chief Justice shall be a member of the Board of Regents of the Smithsonian Institution. Hart & Wechsler's Federal Courts and the Federal System lists a few instances of federal judges receiving extra-judicial appointments at pp. 102-105 and contains otherwise pertinent material at pp. 95-114.

70. Mason, Extra-Judicial Work for Judges: The Views of Chief Justice Stone, 67 Harv. L. Rev. 193, 203-204 (1953).

71. Appendix B, p. 50a.

COMMITTEE F O R EDUCATION

June 8, 1968

TO: Members of the Committee for Education & potential plaintiffs

FROM: Preston R. Wilcox, Chairman
Nancy Mamis, Secretary

On Wednesday, June 19, 1968 at 8. P.M. there will be a meeting with William Kunstler, our lawyer, and people who signed the plaintiff sheets at the May 4th meeting, indicating that they would like to participate in the legal case. The meeting will be held at: 110 Riverside Drive, (entrance is on 83 St.) Apt. 1E. Please telephone SU 7-5314 or 724-1274 if you have any questions.

The appeal of the Hobson vs. Hansen case will be on June 26, 1968 in Washington at 9:30 A.M. at the courthouse on 3'rd and Constitution Avenue. If any members of the Committee or other interested people would like to attend, it should be very interesting in the light of a possible case in New York.

The Washington Post
4-30-67

May Day

The great and wasting transgression of the Washington school system is its irrelevance. And this irrelevance is the point of the protest now taking form as a May Day boycott. Washington's schools are not run by wicked or malevolent people. They do not have the lowest budgets in the country or the oldest buildings. But they are profoundly ineffective in teaching children to read.

Last October the Federal Office of Education published, state by state, the rates of failure among the two million young men who took the Armed Forces Qualification Test, a rather simple mental ability test, in 1965. The national rate of failure was 25 per cent. The District of Columbia rate was 55 per cent, higher than any state in the Union. It was a bit higher than in South Carolina, where the average adult has completed nine years of school compared with 11.7 years in the District. It was even higher than in Mississippi, where the average annual expenditure per pupil was $317 compared with $578 in the District.

A school is a factory to produce competence. The pupil is the consumer. In the May Day boycott, the Washington schools face a consumers' strike against a defective and shoddy product.

The reasons for the shoddiness and the defects lie in the organization of the school system, the subjects that it teaches, and the way in which it teaches them. The Student Board of Education, a group of high school youngsters, is asking for the right to initiate courses and to vote on principals. It is easy enough for adults to depreciate this kind of manifesto, but it is directed toward a matter of central importance: the public schools, run by a great centralized bureaucracy, have fallen into a sterile adversary relationship with the neighborhoods surrounding many of their schools.

The idea of permitting students, or parents, to initiate courses, up to one fourth of the curriculum, is particularly worth pursuing. If school administrators were less rigid on this kind of suggestion, there would be less talk of voting out the administrators.

There is no excuse for a boycott in a city in which citizens can elect their own school boards and city councils. But there is no legitimate outlet for the outrage of this city's people at the inferior quality of the schools. Even those who do not encourage the boycott must concede that the city has been amply warned of the low productivity of the schools, and it has done nothing whatever to reconcile the frightened administrators and the resentful students.

The Washington Post
5-2-67

Period of Grace

The May Day boycott of the Washington schools was, in its immediate and direct effect, a failure. But it was not an insignificant failure, from which the School Board can safely walk away with a shrug. The Board would be wiser to regard it as a shot across its bow, creating more noise than damage, constituting a warning more than an attack.

Only some 250 youngsters turned up at the "freedom school" in the Sylvan Theater. Perhaps several thousand stayed away from classes although, in truth, truancy has reached such levels among bored and depressed high school students that it is not easy to distinguish the daily unorganized boycott from the occasional Hobson boycott. One reason for the relatively small response was, certainly, the sponsorship of the affair. Mr. Hobson has talked himself out of any large organized following in this city, and the Americans for Democratic Action have never had much membership in the city's public schools.

There are much larger civic and political groups with a sharp interest in the schools, but at this particular moment they are waiting to see what happens. Mr. Hobson called the boycott as a protest against the school superintendent's new three-year term; but that new term is an accomplished fact and even the superintendent's critics found little point in protesting it now. Instead, these large organizations seem to be waiting to see what comes out of Mr. Hobson's suit now pending in the Court of Appeals; to see what comes out of the next School Board appointments; to see what comes out of the Passow Report this summer.

These circumstances have given the schools, in effect, a grace period in which to give parents and students evidence of a serious commitment to new and more efficient means of education. May Day has demonstrated that Mr. Hobson and the ADA cannot, alone, run a successful boycott. But there is no reason to think that other organizations in this city, profoundly concerned with the quality of the schools, will not invoke irregular measures if they eventually become convinced that no other device promises improvement.

4

Post
4/25/67 : D.C. Schools

School Board Deadline Passes

Nominations Closed—Quietly

By Paul W. Valentine
Washington Post Staff Writer

The Federal judge in charge of screening nominees for the June 30 selection to the District School Board said yesterday he set an April 15 deadline for submission of names but didn't tell anyone about it unless he was asked.

"Anyone calling my office was advised of the deadline," Judge George L. Hart Jr. said, but no formal or systematic effort was made to announce the date to interested groups and individuals.

Two highly interested groups that didn't get the word are the Washington chapter of the Americans for Democratic Action and the District Democratic Central Committee.

Sunday Meeting

ADA officials learned of the April 15 cutoff Sunday night at a meeting at which members had intended to discuss criteria for selecting School Board members. A spokesman said they were told of the deadline by visiting members of the League of Women Voters.

Telford Dudley, chairman of the Democratic Central Committee, said his organization still hadn't considered any candidates as of yesterday when he first learned of the deadline.

Another active school organization, the D.C. Citizens for Better Public Education, submitted its 11 nominees just under the wire on April 14 only after its officials learned indirectly of Hart's deadline.

Newspaper Story

Hart said he recalled seeing an announcement in one of the daily Washington newspapers about the cutoff, but he could not recall which paper or the date.

He said a total of 28 nominees have been submitted, one of them received last week in an informal extension of the deadline.

He declined to reveal the nominees but listed 25 organizations which he said endorsed them. Besides the ADA and the Democratic Central Committee, the list does not include such potential contributors as the D.C. Education Association, the Congress of P-TAs, the Washington Teachers Union, the Central Labor Council, the Urban League and the NAACP.

Hart said last night it is possible he overlooked some organizations in a hasty search of the files yesterday in response to a reporter's inquiry.

Interviews Planned

The nominees have been submitted for selection by the 15 judges of the U.S. District Court here to replace three outgoing members of the School Board on June 30. Hart, as liaison judge for the School Board, says he needs from now until June to interview each of the 28 nominees and to make his recommendations to the full court.

He said he needs the next two months because he can see the nominees only in the late afternoon after court has adjourned. "I'll come in here on Saturday to interview them if it gets too close to June 30," he said.

He said he did not want to reveal the 28 names because, among other things, he suspects several were submitted without their consent.

JUDGE HART JR.
... set deadline

4-25-67 Star

28 Are Nominated So Far For D.C. Board of Education

U.S. District Court Judge George L. Hart Jr. said yesterday the deadline for nominations to the D.C. Board of Education was April 15 and that names submitted after that date will "be looked at but not given any priority."

Hart, who has returned after a year's absence to his job as liaison judge for the board selections, said the deadline was not made public unless groups interested in making board nominations inquired at his office.

The deadline was about two weeks earlier than usual. Hart said he has received 28 nominations so far. He said he has begun interviewing the candidates and doesn't expect action by the court until late June. There are three vacancies to be filled.

Among the groups which have not met the deadline are the District Democratic Central Committee and the Greater Washington chapter of Americans for Democratic Action. D.C. Citizens for Better Public Education met the deadline only after an inquiry to Judge Hart's office about the closing date.

Hart also said he will not make any attempt to establish a racial quota for board members despite growing demands that the board be composed of a majority of Negroes. The present racial composition is five whites and four Negroes.

Hart said he will try to do something about distributing board members among the four sections of the city. But he said that this distribution would be affected "only if we don't have to lower the quality of the board to do it."

Friendliness toward Supt. Carl F. Hansen's track system or other existing school policies is not a criterion for selection, the judge said, but "the ability to listen to other peoples' ideas" is.

A three-judge panel of the U.S. Court of Appeals, sitting as District Court judges, has denied a complaint from civil rights militant Julius W. Hobson that contended the power of the court to appoint school board members is unconstitutional.

Hart said yesterday he doesn't think the court's appointing function is unconstitutional but said he agrees that the board appointments "are not a proper function of this court."

"In recent years the appointments have become a very political matter. It doesn't make any difference who is chosen, there is always a hue and cry about them. This reflects badly on the courts," Hart said.

The judge said that he is surprised each year that so few people know how much time is necessary to serve on the board and that board members are not compensated even for minor expenses associated with board service.

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DC Schools 4-26-67 Post

More Negroes on Board Urged

Names of 11 School Nominees Disclosed

By Paul W. Valentine
Washington Post Staff Writer

A key education group has included school leader Flaxie M. Pinkett and Howard University Law School dean Clyde Ferguson Jr. in a list of candidates recommended to replace three outgoing members of the District School Board.

The D.C. Citizens for Better Public Education also urged that the nine-member Board become predominantly Negro to reflect more nearly the 91 per cent Negro school enrollment. Four of the current members are Negro.

The recommendations came in a letter to District Court Judge George L. Hart Jr., who is in charge of screening nominees for the Board. The full court of 15 judges will elect three members after Hart interviews and recommends nominees.

Hart took several civic organizations by surprise Monday when he revealed that he had set an April 15 deadline for the submission of nominees. Leaders of some organizations, relying on past practices, thought the deadline was May 1 and had not yet selected candidtes.

Hart acknowledged he did not formally announce the April 15 deadline in advance, but said he had advised anyone calling his office of the date.

He said he had received the names of 28 nominees but declined to reveal them. It was learned, however, that the Citizens for Better Public Education submitted 11 nominees, six of them Negroes and five white. They are:

Miss Pinkett, 49, of 4210 Argyle ter. nw., chairman of the Citizens Advisory Council to the Superintendent of Schools and president of the Pinkett Real Estate & Insurance Agency; Dan Ferguson, 42, of 1601 Kalmia rd. nw.; the Rev. James Coates, 37, of 1210 Howard rd. se., staff director of Congress Heights Neighborhood Development Center; Julian Dugas, 48, of 1313 Hamilton st. nw., director of the Neighborhood Legal Services project; Walter B. Lewis, 48, of 207 Anacostia ave. ne., director of the Federal Programs Division of the U.S. Civil Rights Commission.

Also, the Rev. Channing E. Phillips, 39, of 1373 Locust rd. nw., vice chairman, Coalition of Conscience; Mrs. Edwin Snell, 45, of 3100 R st. nw., editor-writer for the National Academy of Engineering; Mrs. William Wendt, 41, of 1503 Newton st. nw., substitute teacher and wife of the Rev. William Wendt, civil rights activitist; Gerry Levenberg, 36, of 2824 28th st. nw., attorney; William A. Rich, 51, of 6447 31st st. nw., attorney for the Veterans Administration, and the Rev. Alfred Shands III, 38, of 617 I st. sw., pastor of St Augustine's Church.

The Citizens for Better Public Education, as in past years, interviewed all the candidates before recommending them to Judge Hart.

"All of them have indicated great interest and concern about our school problems," the organization told Hart. "All of them have felt that they had the time or would make time to do a good job."

The predominantly Negro social fraternity, Omega Psi Phi, also submitted names of two candidates: Bernard Coleman, special assistant to the Assistant Secretary of State for African Affairs, and Anita Ford Allen, compensatory education specialist in the U.S. Office of Education.

The candidates have been nominated to succeed Board members Louise S. Steele, West A. Hamilton and Irving B. Yochelson whose terms expire June 30.

Selection by Whim

DC Schools 4-26-67 Post

Many people have been uncertain until now as to what constitutes the very worst possible way to choose a Board of Education. It could be done by lottery; it could be left entirely to political patronage; or, the positions could be offered at auction to the highest bidder. It remained for United States District Judge George L. Hart Jr., however, to resolve the uncertainty by coming forward with a method of selection demonstrably and definitively worse than any hitherto imagined. Judge Hart is going to do it by personal whim.

If Judge Hart's personal whims had any relation whatever to community desires or embraced any comprehension of community needs, this method might, by sheer luck, turn out to be supportable. But the Judge's whole background as a lawyer and GOP politico, on top of his judicial eminence and isolation, has quite cut him off from contact with the general community. True, he has intimated that he may take into account some recommendations from assorted local groups and associations. These were the community organizations fortunate enough to find out that the Judge had set, in his own mind, a cut-off date for such suggestions, although without letting the date be known publicly.

Judge Hart, in his bumbling, benevolent way, means everything for the best, of course. But his colleagues on the District Court ought to know, we think, before they complacently and perfunctorily ratify his ukase in this matter, that the responsibility for selecting a School Board devolves, by act of Congress, not on him individually but on them collectively. They cannot conscientiously duck this responsibility by letting Judge Hart act out his little charade, including personal interviews with those under consideration even if he has to go into the office on Saturdays to see them.

There is nothing more important to this community than its public school system. Allowing a Court to pick its Board of Education is about as satisfactory as letting a parent-teacher association pick its judges. But it is not quite as unsatisfactory as letting a single judge do it.

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Post 4-27-67

Judge Hart Alters Deadline For District School Board

By Paul W. Valentine
Washington Post Staff Writer

Federal Judge George L. Hart Jr. changed signals yesterday on his unannounced April 15 deadline for submission of District School Board candidates saying that the date was only a cutoff for priority nominees.

Candidates recommended after April 15 will not stand as good a chance of getting the job, the Judge said, since "the later their names come in the less time there will be to interview them." He established no new deadline, but the School Board selections must be made by June 30.

Hart said he set the original deadline "to try to get all the names in as early as possible . . . this interviewing business takes a long time. There is lot of checking to be done."

He acknowledged that he did not make a formal announcement of the time limit in advance, but said "anyone calling my office was advised of the deadline."

The two dozen candidates whose names were submitted in time will get priority, Hart said.

Series of Interviews

They will come to his District Courthouse office in a series of scheduled interviews in May and June. He must complete the screening process and recommend candidates for a vote by the full 15-judge Court before June 30. He said he will interview candidates whose names were submitted after the April 15 cut-off only if there is still time after completing the pre-April 15 group.

Several organizations, including the Washington Democratic Central Committee and the local chapters of the NAACP and the Americans for Democratic Action, said they were unaware of the April 15 deadline. Spokesmen for both the NAACP and the ADA said they had not yet submitted names because they were relying on what they considered to be the traditional deadline of May 1.

Circulated Memo

Hart said yesterday several names have come in since April 15. The overall total now stands at 39, but he would not reveal the names.

Recommendations have come from a diverse cross-section of civic and political organizations in the city ranging from parent-teacher associations and church groups to the League of Women Voters and the Licensed Practical Nurses Association.

Hart has also circulated a memo to the other 14 judges of the District Court asking them to recommend qualified persons. He said several have submitted names.

Three candidates will be elected by the judges before June 30 to succeed outgoing School Board members Louis E. S. Steel, West A. Hamilton and Irving B. Yochelson.

Hart, as liaison judge for the School Board, is in charge of screening candidates this year. Last year, a three-judge committee (not including Hart) did the screening job.

Though the ultimate vote of the full Court was kept secret, it is understood that it was far from unanimous and was preceded by hot debate.

Post 5-12-67

Mid-June Deadline

Hart Reduces Time For Picking Board

District Court Judge George L. Hart Jr. yesterday lopped two weeks off the remaining time for the full court to select three School Board members from more than 50 candidates whose names have been submitted for consideration.

Hart, the judge in charge of screening candidates for recommendation to the full 15-judge court, said the final selection will be made by June 13 or 15 instead of at the end of that month as originally intended.

He said he moved the target date up two weeks at the request of A. Harry Passow, Columbia University Teachers College professor who wants to present a "private preliminary report in mid-June to the full School Board, including its new members, on his long-awaited $270,000 survey of the District school system.

The net effect of the date change is that Hart now has little more than a month left to interview, screen and recommend candidates.

He said some have already been interviewed, "but I don't think I will interview everyone."

"There are some who, on the basis of biography and investigation, would not warrant serious consideration," he said pointing to a large stack of letters and biographical resumes on the candidates.

Hart said earlier it has been difficult to schedule interviews because he can see persons only after the court day is over at 4 p.m. He originally set an April 15 deadline for the submission of candidates' names, explaining later that the date was a cutoff for "priority" candidates only. Because of the press of time, he said, persons recommended after April 15 would stand less chance of being interviewed.

JUDGE GEORGE L. HART
. . . heads screening group

Hart set the mid-April cutoff without formally announcing it. He told newsmen about it when they inquired on April 24. After news accounts on April 25, several civic and educational organizations which customarily recommend School Board candidates each year expressed surprise.

5-14-67 Post

7

School Board Selections Due

Choice to Have Big Impact On System's Policy-Making

By Susan Filson
Washington Post Staff Writer

Washington's 15 Federal District judges will select three new School Board members early in June to replace Louise S. Steele, Col. West A. Hamilton and Irving B. Yochelson.

Their decision can have a major effect on school policy-making next year—particularly on relations between the Board and Superintendent Carl F. Hansen.

Mrs. Steele, Hamilton and Yochelson all supported Hansen when the bitterly divided Board reappointed him by a 5-to-4 vote this spring. "One of the most significant things about the Superintendent's reappointment," said one Board member after the vote, "is the fact that three of his five supporters will be off the Board in June."

Judge George L. Hart Jr., who is interviewing candidates nominated by civic organizations and interested individuals, has a record of favoring Board nominees who support Hansen's policies.

Unusual Amount of Confusion

After the interviews are completed, Hart will present his nominations for the Board to the full panel of judges. The judges usually approve the nominees presented to them, but it is known that several judges have nominated their own candidates for the Board this year.

An unusual amount of confusion has surrounded the appointment procedures this year. Hart set an April 15 cutoff date for nominations without announcing it publicly and several civic organizations were caught by surprise.

Then Hart said that April 15 was only a cutoff date for "priority" candidates and other organizations could still submit nominees.

The Board members are usually selected by the full panel of judges at the end of June, but Hart has moved the date up two weeks.

A. Harry Passow, who is directing a $250,000 study of Washington's school system, asked that the new Board members be named early so they can be present at a private preliminary briefing on the report's conclusions during the middle of June.

Several Interviews Unscheduled

Hart said he might not be able to interview every candidate and that those submitted before April 15 would have priority. Several candidates contacted by The Washington Post said Hart has made no arrangements to interview them.

More than 50 candidates have been nominated. The full list of names is traditionally kept secret and cannot be obtained from the Court, but several civic organizations released their lists of candidates.

D.C. Citizens for Better Public Education urged the Court to break with tradition and give the Board a Negro majority "in view of the fact that more than 90 per cent of the District's public school students are Negro."

Of the outgoing Board members, Hamilton is Negro and Mrs. Steele and Yochelson are white. The Board now has four Negro members and five white members.

Some Board appointments have been severely criticized in the past because so few Board members actually have children in the public schools. This year, three of

See BOARD, F14, Col. 3

BOARD—From F1

D.C. School Selections Due Soon

the nine Board members have children attending public schools.

Of the Board candidates whose names have been revealed, 12 have children attending public schools in the District.

The candidates nominated this year reflect a broad range of educational philosophies. Some, like the Rev. Channing E. Phillips, have been severely critical of school policies such as the track system of grouping students. Others, like Grace C. Baisinger, have generally favored Hansen's policies. Still others are relatively unknown outside their P-TAs and community groups but have spent years working in the schools.

However, speculation on the educational philosophy of School Board candidates has not always been borne out by their subsequent positions on the Board. Last year, the appointment of Ann H. Stults, Benjamin H. Alexander and John A. Sessions was widely hailed as a victory for critics of the school system.

But Mrs. Stults has usually joined forces with Hansen's supporters on the Board this year and voted for his reappointment. Alexander and Sessions voted against renewing Hansen's contract.

Named by Civic Groups

Biographies Given Of Candidates for School Board Posts

The names of the following candidates nominated for the District of Columbia Board of Education have been revealed by the nominating organizations.

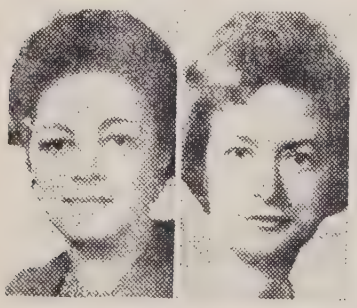
One candidate, D. Deane Ferguson, could not be reached for biographical data. Ferguson, 42, is a lawyer and was nominated by D.C. Citizens for Better Public Education.

Anita Ford Allen

Anita Ford Allen, 42, is an area chief in the U.S. Office of Education's Division of Compensatory Education, which deals with programs for disadvantaged students.

Mrs. Allen administers Title I of the Elementary and Secondary Education Act, which provides funds for slum schools. She has three children in Washington's public schools and is a member of the Backus Junior High School P-TA.

Mrs. Allen feels that a better organization of the school system's administrative structure could be a major factor in reversing the "decline in the quality of public education in Washington." She was nominated for the Board by the D.C. Education Association.



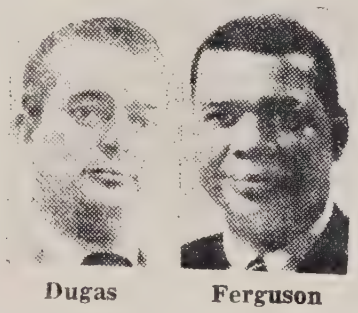
Mrs. Allen Mrs. Baisinger

Grace C. Baisinger

Grace C. Baisinger, past president of the D.C. Congress of Parents and Teachers, believes the School Board "must make more of an effort to work with related agencies inside and outside of the D.C. government to solve school problems."

Mrs. Baisinger, 44, says the Board should also be more aggressive in asking for school construction funds because "overcrowded facilities stifle innovation in the schools."

The D.C. Education Association nominated Mrs. Baisinger for the Board. In addition to her P-TA activities, she is active in the National Conference of Christians and Jews.



Dugas Ferguson

legal officer of a Federal agency.

Before he was named dean at Howard in 1963, Ferguson served as general counsel for the U.S. Civil Rights Commission. He came to the Commission from Rutgers University, where he was one of the first two Negroes in the Nation to serve on the faculty of a predominantly white law school.

While living in New Jersey, Ferguson filed the Newark school desegregation suit. It was the second suit charging school district gerrymandering for racial purposes. A father of three, Ferguson was nominated for the Board by D.C. Citizens for Better Public Education.

Gerry Levenberg

Gerry Levenberg, 36, is a lawyer and president of the Washington Planning and Housing Association.

He says the schools need "more teachers, more classroom space, more money and a lot more understanding on the part of everybody in the community about what the educational system is supposed to do—to educate."

A Washington resident since 1958, Levenberg was chairman of the National Capital Transportation Agency's Advisory Board from 1964 to 1966. He has also served on the Commissioners' Planning and Urban Renewal Advisory Council. Levenberg has a 3-year-old son and was nominated for the Board by D.C. Citizens for Better Public Education.

Marvin G. Cline

Marvin G. Cline, 41, is a testing specialist who says standardized tests used to place District public school students in tracks are weighted against the disadvantaged.

Cline, assistant director of Howard University's Institute for Youth Studies, is now working on a national evaluation of Project Head Start for the Office of Economic Opportunity.

He is the father of three public school students and has been endorsed for the Board by D.C. Citizens for Better Public Education, the Washington Teachers Union and Neighbors, Inc.

Cline Mr. Coates

James E. Coates

The Rev. James E. Coates, 37, says "the highest priorities should be assigned to the solution of the problems of schools in the inner city or ghettos."

Mr. Coates, staff director of the Congress Heights Neighborhood Development Center, advocates the development of "community schools" to be open on an all-day, year-round basis.

He suggests that "the entire operation of a vocational school could be subcontracted to appropriate unions or commercial establishments." Mr. Coates's children attend public schools, and he was endorsed for the Board by Americans for Democratic Action and D.C. Citizens for Better Public Education.

Julian R. Dugas

A 12-month school year for Washington is one proposal advanced by Julian R. Dugas, director of the United Planning Organization's Neighborhood Legal Services Project.

Dugas says students would be enrolled in staggered terms during the school year under his plan. A former assistant D.C. corporation counsel, he is now an adjunct professor of law at Howard University.

At 48, Dugas is married and has four sons—two of them in public schools. D.C. Citizens for Better Public Education endorsed him for the Board.

Clarence Ferguson Jr.

Clarence C. Ferguson Jr., 42, dean of Howard University's Law School, was the first Negro to serve as the chief

Levenberg Lewis

Walter B. Lewis

Walter B. Lewis, director of the Federal Programs Division of the U.S. Civil Rights Commission, believes the problem of educating disadvantaged students in the District "really boils down to a low aspiration level on the part of teachers."

Lewis, 48, says there is "an incredible lack of empathy between the administration, the teaching staff and the community." He has one child in public school and another in private school.

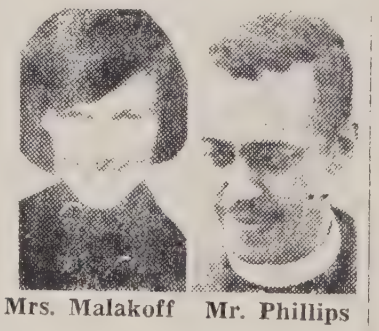
Lewis is a past president of the River Terrace Elementary School P-TA. He was endorsed for the Board by D.C. Citizens for Better Public Education and the Washington Teachers Union.

Grace Malakoff

Grace Malakoff, mother of three public school students, has a long record of activity in the field of public education.

Mrs. Malakoff is the coordinator of a continuing education program on urban affairs at American University. A resident of Little Rock, Ark., from 1956 to 1960, Mrs. Malakoff was a member of the Women's Emergency Committee to Open Our Schools during the Little Rock school desegregation crisis.

A past president of the Oyster P-TA — which nominated her for the Board—Mrs. Malakoff says school programs must be "rooted in neighborhood dialogue with parents."



Mrs. Malakoff Mr. Phillips

Channing E. Phillips

As chairman of the Committee for Community Action on Public Education, the Rev. Channing E. Phillips has consistently maintained that Washington's schools have lost touch with the community they serve.

Mr. Phillips, 39, is pastor of the Lincoln Memorial Congre-

See CANDIDATES, F3, Col. 1

CANDIDATES—Fr. F2

Who's Who In School Board Race

gational Temple, which serves the Cardozo area. He has two children in public schools. Mr. Phillips has called for decentralization of the school system and an end to the track system of grouping students.

He was nominated for the Board by the Washington Teachers Union, Americans for Democratic Action and D.C. Citizens for Better Public Education.

Flaxie M. Pinkett

Flaxie M. Pinkett, president of D.C. Citizens for Better Public Education, says "one of the most important requirements for improving the school system is that the School Board operate as a team."

Miss Pinkett, 49, feels the Board has become "too caught up in personality conflicts." A prominent civic leader for many years, Miss Pinkett is the president of the Pinkett Real Estate and Insurance Agency. She is the chairman of the School Superintendent's Citizens Advisory Council.

Miss Pinkett has been endorsed for the School Board by several organizations, including D.C. Citizens for Better Public Education, Americans for Democratic Action and the D.C. Education Association.

Miss Pinkett Rich

William A. Rich

William A. Rich, a lawyer with the Veterans Administration, played a major role in a successful drive by citizen groups last year to have Washington included in the Federal impact aid program.

He was also instrumental in obtaining funds from Congress for a new school for handicapped children. A member of the board of directors of D.C. Citizens for Better Public Education, Rich has three children in public schools. D.C. Citizens for Better Public Education and the D.C. Education Association have endorsed him for the Board. Rich, 51, says the school system must make "maximum use of the technical knowledge available to aid learning."

Alfred Shands III

The Rev. Alfred Shands III, vicar of St. Augustine's Episcopal Chapel in the Southwest redevelopment area, says "the time has come for the School Board to exercise imagination in facing the radical problems which are upon us."

Mr. Shands, 37, emphasizes that an "all-out attack must be made on the inability of children to read properly" and advocates more cultural enrichment programs like the Arena Stage project in Southwest elementary schools.

Mr. Shands has served on the Board of the Washington Planning and Housing Association and is a member of the Southwest Community Council. D.C. Citizens for Better Public Education and Americans for Democratic Action have endorsed him for the Board.

Mr. Shands Mrs. Simmons

Barbara Simmons

Barbara L. Simmons, 39, says one of the major needs of Washington's school system is for "some creative, realistic, imaginative administrators."

Mrs. Simmons, a sixth-grade public school teacher in Montgomery County, is particularly interested in developing a "more viable and realistic curriculum" for Washington's schools.

She has a son at Shepherd Elementary School and has been a member of the board of directors of Neighbors, Inc. A past president of the Paul Junior High School Home and School Association, she was nominated for the Board by the Washington Teachers Union.

Mrs. Edwin M. Snell

Mrs. Edwin M. Snell, 45, researched and wrote the major portion of a section on the track system for the 1965 Pucinski report on Washington's school system.

But Mrs. Snell did not agree with the Pucinski subcommittee's conclusion that the track system should be scrapped. She felt that only the basic track for students who are classified as slow learners should be dropped.

Mrs. Snell's two children attended public elementary and junior high schools and private high schools. An editor

See CANDIDATES, F4, Col. 3

CANDIDATES—From Page F3

Profiles of Candidates For School Board Posts

and writer for the National Academy of Sciences, she was active in the D.C. Congress of Parents and Teachers for many years and has been nominated for the Board by D.C. Citizens for Better Public Education.

Mrs. Snell Tilghman

Cyprian O. Tilghman

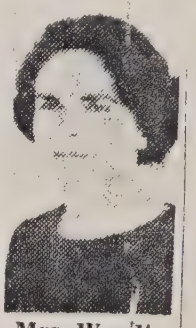
Cyprian O. Tilghman, 53, is the father of 13 children—all of them graduates or students in Washington's public schools.

Tilghman is financial secretary-treasurer of the Washington local of the Hotel Service Workers Union, AFL-CIO. He is vice president of the Maryland State and District of Columbia branch of the AFL-CIO and chairman of its civil rights committee.

School curriculums should be designed with individual needs in mind, Tilghman says, rather than handed down from a central administration. He believes crowded classes are also a major problem. Tilghman has been endorsed for the Board by Americans for Democratic Action.

Mrs. William Wendt

Mrs. William Wendt, 41, has spent the last two years working with children in many of Washington's poverty - area schools.



Mrs. Wendt

As a teacher aide and as a substitute teacher, Mrs. Wendt has become convinced that "we need a reduction in class size, more competent professional aides and a massive program of re-education for teachers working with deprived students."

She is married to the Rev. William Wendt, pastor of St. Stephen's and the Incarnation Church, which serves a blighted neighborhood in the Cardozo area. She has four children who attend public schools and has been nominated for the Board by D.C. Citizens for Better Public Education.

School Board-1

Star 2-18-67

The Court's Role

ACT School suit

The split-decision by a Court of Appeals panel in a case involving the right of District Court judges to appoint members of Washington's local school board is interesting on two counts.

The majority ruling by Judges Wilbur Miller and Charles Fahy sustains the constitutionality of a 1906 act of Congress which designated the federal judges here as the sole school-board appointing authorities. Their reasoning is persuasive.

The ruling does not contend that the current method of choosing the school board is the most desirable plan. But it affirms the right of Congress to select this method under the powers granted the legislators by Article I of the Constitution to exercise legislative control over the District "in all cases whatsoever." These powers, they assert, include the imposition of "nonjudicial duties" upon federal District Court judges here which would be beyond the authority of federal judges elsewhere. And the majority ruling finds no constitutional principle which prohibits the Washington courts from acting in this unique "dual character."

The second point of interest is the vehement dissent of the panel's third member, Judge J. Skelly Wright. And the major interest in this regard lies not so much in the fact that Judge Wright takes issue with his colleagues' findings, but in the points he advances in reaching his conclusions.

The thread which runs throughout his lengthy dissent is a contention that the federal courts should "refrain from indulging" in "nonjudicial activities." Federal judges, said Wright, have no "special competence" to cope with the problems of education. To engage them in such extrajudicial duties, he says, is "politically illegitimate." To throw them into the "vortex of political activity" undermines confidence in the judicial process. Judges should be "saved from entanglements" which might compromise their effectiveness on the bench. In terms of selecting school board members, he laments, the appointing authority is forced in some degree to decide "where educational wisdom lies."

This is the same Judge Wright, however, who, in a February, 1965, speech, spoke disparagingly of two decisions holding that federal courts were without power to relieve de facto segregation in public schools, who said school authorities should be "cured of the neighborhood school syndrome," who advanced several alternative views of educational wisdom, who suggested, in terms of the courts' role, that "the political thicket, having been pierced to protect the vote, can likewise be pierced to protect the education of children."

And this is the same Judge Wright who now is sitting in judgment in the Julius Hobson suit seeking various forms of relief against the conditions of de facto segregation existing in District of Columbia schools.

Presumably, in Judge Wright's mind, there is no inconsistency between the views expressed in his 1965 speech and those he advanced last week in the school board dissent. Strictly speaking, this may be right. A public speech is one thing, a judicial opinion something else again. Nevertheless, it seems to us that judge Wright has demonstrated again that his personal prejudices cannot easily be distinguished from his judicial attitudes.

Hobson

FELLER & ANKER
Attorneys and Counselors
1001 CONNECTICUT AVENUE, N. W.
WASHINGTON, D. C. 20036

DAVID E. FELLER
JERRY D. ANKER

AREA CODE 202
DISTRICT 7-2207

December 12, 1966

William M. Kunstler, Esq.
Kunstler, Kunstler & Kinoy
511 Fifth Avenue
New York, New York 10017

Dear Bill:

Enclosed is a motion filed by North Washington Neighbors, Inc. for leave to file an amicus brief. Counsel for Neighbors is a former associate of mine who is still sharing our office suite. He assures me that his brief will generally support our position in the lawsuit. Neighbors is a middle-class integrated civic organization which is greatly respected in Washington, and I think their support would be very helpful.

Sincerely yours,

Jerry D. Anker

Enclosure

P.S. Did you see the enclosed N.Y. Times story?

Wash. Post
12-6-66
ACT Suit

12-5-66 ACT Suit

Lawyer Defies Warning For School Suit Silence

By SUZANNE SNELL
Star Special Writer

William M. Kunstler, chief counsel for Julius Hobson and other plaintiffs in a suit charging de facto racial segregation and discrimination in District public schools, spoke about the case at a public meeting last night despite a warning from James M. Cashman, assistant corporation counsel.

Counsel for the District Board of Education in the case, Cashman had written Kunstler that his appearance would be "a serious breach of professional conduct."

Judge J. Skelley Wright of the U.S. Court of Appeals, who heard the suit, gave lawyers for both sides until Dec. 20 to file briefs. The hearing ended Nov. 25. Wright is expected to deliver his opinion after rebuttal briefs are filed in late January.

At stake are a number of issues involving organization and operation of the District school system.

A decision on whether the school system is obligated to consider race in setting up school boundaries and whether school officials are responsible for racial imbalance despite an absence of intent to discriminate could have far-reaching effects.

Kunstler said the letter from Cashman was an "open threat" to keep him from speaking at the meeting, held at Temple Sinai last night by the Committee for Community Action in Public Education.

About 150 persons including school board members Euphemia Haynes and Dr. Benjamin Alexander listened to Kunstler detail the points made in the hearing of the case. Donations from the audience to defray costs of the suit amounted to $970 in cash and pledges.

Cashman's letter, dated Dec. 2, said that if Kunstler appeared to discuss the case before it was decided, his conduct, "if not violative of Canon 20 of the Canons of Professional Ethics, will constitute a serious breach of professional conduct."

Cashman noted he was sending a copy of the correspondence to Judge Wright.

Corporation Counsel Charles T. Duncan, Cashman's superior, said he did not read the letter or approve it before it was sent to Kunstler's New York office.

He added that he was aware of the letter, however, and agreed in general with Cashman's point of view. But he observed, "I might not have said it in the same way."

At the meeting, Hobson showed the audience charts used to document his charges of racial discrimination in the District's track system, in the assignment of teachers, and in allocations of funds to different area schools.

Alexander said he agreed with Hobson that school board members should not be appointed by District Court judges but should be selected through some other means, perhaps in an election.

Hobson Suit Curb Defied By Counsel

ACT - Schools

The New York civil rights attorney who is pressing a suit against the District School Board charging de facto segregation defied a warning from an assistant corporation counsel and spoke about the suit at a public hearing.

William N. Kuntsler, chief counsel for Julius Hobson, head of the militant ACT organization, and other plaintiffs said the case was too important for him to heed a letter from Assistant Corporation Counsel James M. Cashman.

Kuntsler told some 150 persons attending a Sunday night meeting of the Committee for Community Action in Public Education that Cashman's letter "poses a very serious threat to my professional standing. (It) represents something very sinister."

But, he contended, "it is important and ethical and right for me to report about this case."

Kuntsler and Cashman have until Dec. 20 to file briefs in the case, which has been taken under advisement by Judge J. Skelly Wright of the U.S. Court of Appeals. The suit is being heard in that court because it alleges, among other matters, that it is unconstitutional for U.S. District Court judges to appoint School Board members.

Cashman wrote Kuntsler that his appearance at the meeting at Temple Sinai would be "a serious breach of professional conduct . . . If you undertake to discuss in a public forum a case not concluded and presently under advisement . . . I will undertake whatever formal action that is proper."

He suggested that he would report Kuntsler to the Bar Association's grievance committee.

Corporation Counsel Charles T. Duncan said yesterday that Cashman mailed the letter to Kuntsler before he had a chance to see it but that he approved its "general content."

He said Canon 20 "provides generally that where a case is under litigation, attorneys in the case should not make public statements about (it)."

However, Duncan said, he does not plan to take any action against Kuntsler, "nor do I expect that any action will be taken with the help" of his office.

ACT: Schools

Out of Bounds Post 12-10-66 ACT Suit

It was foolish of James Cashman, an Assistant Corporation Counsel, to threaten Attorney William Kunstler with disciplinary proceedings in the event that Mr. Kunstler appeared at a scheduled public meeting to present and defend his views about Julius Hobson's *de facto* segregation suit filed against the Washington school system. Mr. Kunstler, wisely and predictably, disdained the threat and went right ahead with his public speech.

Mr. Cashman's action was foolish as a matter of law. There is nothing at all illegal or improper in public discussion of pending litigation by an attorney so long as he does not impugn the integrity of the trial judge or obstruct the administration of justice. Unfortunately, Mr. Cashman's action was even more foolish as a matter of judgment and policy. Its evident aim was to silence the expression of views to which he was opposed—in short, to suppress speech by intimidation.

Mr. Cashman appears to be endowed with more zeal than discretion. A couple of months ago he persuaded members of the Board of Education to sign a motion asking Judge J. Skelly Wright to disqualify himself from hearing the same suit. The motion was offensive and unwarranted as well as foolish. A will to win is all very well in a lawyer; but it needs to be kept within bounds. Happily Corporation Counsel Charles Duncan has made it pretty clear that he has no sympathy with the threat against Mr. Kunstler and that he means to take no further action in the matter. It might be well to remind Mr. Cashman that in the big leagues three strikes are generally considered out.

How to Be Heard Post 12/29/66

The 12 demonstrators who were arrested on Wednesday at the Board of Education headquarters in Brooklyn, N.Y., for sitting in the seats of Board members were not the inventors of this ingenious form of protest. Washington's own Julius Hobson tried it at Board of Education headquarters here a year or more ago; and it may well be that the tactic has even earlier antecedents. One can easily denounce it as deplorable. It cannot be justified in terms of law and order or the democratic process. It ignores the mechanisms for reform made available by the ballot and has unmistakable overtones of mob rule.

But when all this has been acknowledged, there remains a puzzlement about what course the protestants ought to pursue. They see their children being cheated of a decent education—out of the only chance to lift themselves out of the misery and helplessness of their ghetto upbringing. They know that as far as these children are concerned, the orderly operation of the democratic process is too slow to save them. They must go to school now—and to a school which is physically overcrowded, understaffed, ill-equipped, and still segregated. They know, in short, that their children—most of them—are already doomed.

They know, too, from patient experience, that the ordinary, orderly forms of protest are of no avail. They have tried these repeatedly—only to be told that funds are lacking, that the ills which already existed in their own childhood cannot yet be remedied for their own children. New York, like Washington, has its Shameful Shaws, standing forlorn and dilapidated as mute reminders of the futility of peaceful petition.

It is very bad of people in despair to take the law into their own hands and transgress its orderly procedures for reform—very bad indeed. But it is even worse, perhaps, to let them become convinced that they cannot win attention to their plight by any other means.

Hobson 2852

Washington Star

10/26/66

Schools Trial Ends, Briefs Due Dec. 20

By JOHN STACKS
Star Staff Writer

The trial of a suit charging the District with discriminating against its Negro school pupils ended yesterday in U.S. District Court after accumulating more than 6,000 pages of testimony from nearly 30 witnesses in collecting about 400 separate pieces of evidence.

Lawyers for both sides in the complex case were instructed by Judge J. Skelley Wright to file their briefs with the court by Dec. 20. Wright is expected to deliver his opinion after rebuttal briefs are filed in late January.

At stake in the action brought by Washington civil rights leader Julius W. Hobson are a number of issues involving the organization and operation of the city school system and, perhaps, the operation of school systems throughout the nation.

The suit alleges, among other things, that Negro pupils get unequal treatment in the city schools in terms of quality of teachers, the courses open to them through the track system of ability grouping and the selection of tests by which their performance is measured.

But a more far-reaching effect of the suit could be the court's decision on whether a school system is obligated to consider race — rather than ignore it — in setting up attendance boundaries.

And a second question, the converse of the obligation to consider race, is whether school and other government officials are responsible for racial imbalance in the schools despite the absence of any intent to discriminate against Negroes.

Perhaps the most explosive issue in the suit is the role the Washington suburbs might play in providing a remedy to the heavily Negro composition of the city schools.

The legal possibility of the court's crossing state lines to effect racial balance in area schools is considered slim by many atterneys, but other lawyers are convinced Wright has the power and some precedent upon which to take such action.

The involvement of the suburbs in the case (school officials from Maryland and Vrginia suburbs testified early in the trial) has already triggered statements by campaigning politicians who have condemned any action that would require the busing of children into or out of the suburbs to achieve racial balance.

More generally, growing objections to U.S. Education Commissioner Harold Howe's statements on busing, coupled with the growing reaction to militant civil rights activities have increased interest in the Hobson case.

Judge Wright himself has given public notice that he is aware of the relation of the suburbs to the racial composition of urban schools. In a speech last year at the New York University Law School he also said he feels federal courts, including the Supreme Court, must some day grant relief to the problems of so-called de facto segregation.

The speech became an issue in the suit when the District Corporation Counsel asked Wright to reconsider his suitability to hear the Hobson case in light of his public statements. He declined to step down from the case because, he said, the petition was filed late and thus violated rules of judicial procedure.

Regardless of the direction Wright takes in his decision, the case seems certain to be appealed first to the U.S. Circuit Court of Appeals here and then, undoubtedly, to the Supreme Court.

The Hobson suit, the first de facto school segregation suit filed in a major U.S. city, is likely to become, one way or another, an important landmark in a legal struggle over race and education.

2838

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COMMISSION ON LAW AND SOCIAL ACTION

HOWARD M. SQUADRON, CHAIRMAN — JOSEPH B. ROBISON, DIRECTOR

July 21, 1966

William L. Kunstler, Esq.
511 Fifth Avenue
New York, N. Y.

Dear Bill:

I would appreciate it if you could spare us a copy of the complaint seeking elimination of segregation in the District of Columbia, written up in such great length in the New York Times of July 19. It looks very exciting.

Best regards.

Yours sincerely,

Joe

Joseph B. Robison

Hobson v. Hansen
Sent complaint + representations
10/13/66

Star 3-4-67

Judge Hart's Record

The thankless task of selecting members of the local school board is a non-judicial burden which our District Court judges would be delighted to give up. The duty, however, was imposed on the court by Congress early in this century, and over the years it has been discharged diligently and responsibly.

This generalization applies specifically to the record of Judge George L. Hart Jr., who has just been designated by the court to screen school board nominees during the coming year—and who, for his pains, is being subjected now to a barrage of totally irresponsible and inaccurate criticism.

One critic contends that Hart, by virtue of his "control" of appointments from 1960 to 1965, is responsible for a school board cast in the image of his own preferences—that is to say white, upper-middle-class Republicanism. The facts are that Hart's involvement in this subject began in 1963, not 1960; that while he had a certain amount of influence as chairman, he was only one of three members of the judicial screening committee, and that the ultimate appointments were agreed upon by the court as a whole.

The truth is distorted most flagrantly, however, by the implication that during these years the character of the school board was molded by Hart. What actually happened was this:

The three members chosen in 1963 were all reappointees—Dr. Preston McLendon, who was originally appointed in 1957, Wesley S. Williams, a board member since 1951, and Mrs. Gloria Roberts, first named in 1960.

The three chosen in 1964 were Louise S. Steele, who had served since 1960; Irving B. Yochelson, named first in 1961, and West A. Hamilton, who had been a board member for various periods dating back to 1937.

And in 1965 the choices consisted of the reappointment of two more school board veterans, Dr. Euphemia Haynes and Carl C. Smuck, plus the Rev. Everett A. Hewlett.

In other words, the net change in the school board during this three-year period of allegedly massive transition consisted of a single new member, Dr. Hewlett, a Negro minister from Northeast Washington. And the reappointments included the most vociferous of the board's antagonists to Superintendent Hansen—its current president, Dr. Haynes.

The three members whose terms will expire next July—Hamilton, Yochelson and Steele—have indicated no interest in serving another term. So the old pattern of reappointment in 1967 will be changed. We do not envy Judge Hart his task of sitting this year under revised court procedures as a one-man screening committee. But we have every confidence that his recommendations to the full court will be based this year on the same fundamental criterion which has applied in the past—the fitness of the candidates for the job.

Chicago Tribune
FOUNDED JUNE 10, 1847

J. HOWARD WOOD, Publisher
W. D. MAXWELL, Editor

Saturday, October 22, 1966

THE NEWSPAPER *is an institution developed by modern civilization to present the news of the day, to foster commerce and industry, to inform and lead public opinion, and to furnish that check upon government which no constitution has ever been able to provide.*

—THE TRIBUNE CREDO

THE CROSS-TRANSFER OF SCHOOL CHILDREN

U. S. News & World Report calls attention to a pending case in the United States Court of Appeals for the District of Columbia which may prove of momentous effect on the question of neighborhood schools "where *de facto* segregation often prevails." The decision could have far-reaching implications for school busing and could open the way, thru an appeal to the Supreme court, for rulings that could fix "the law of the land" without any action by Congress.

The suit, brought by a militant civil rights leader acting with parents of Negro school children, nominally demands that schools of Washington, D. C., be made the equal of those in nearby suburban areas of Virginia and Maryland. Washington's public school enrollees are 93 per cent Negroes. The percentage of white pupils in the suburbs is about the same in reverse.

The case was assigned to Judge J. Skelly Wright, who refused a motion by the defendant school board and superintendent to step aside. The Washington Star, reviewing some of Judge Wright's previous statements on the issue in controversy, concluded that "he has anything but an open mind on the issue of *de facto* segregation, which lies at the heart of this lawsuit."

In a speech at New York university law school in 1965, for example, Judge Wright referred caustically to watching "some of my judicial brethren in the south twisting and turning and reaching for a result in 'race cases that will not upset the *status quo* or the local power structure.' "

"It is inconceivable," the judge asserted, "that the Supreme court will long sit idly by watching Negro children crowded into inferior slum schools, while the white people flee to the suburbs to place their children in vastly superior predominantly white schools.

"Obviously, court orders running to local officials will not reach the suburbs. Nevertheless, when political lines, rather than school-district lines, shield the . . . inequality . . . courts are not helpless to act. The political thicket, having been pierced to protect the vote, can likewise be pierced to protect the education of children."

It was this last remark, the Star said, which led to speculation that Judge Wright might order Negro children bused out of Washington into suburban schools, and white children bused from the suburbs into Washington.

"On its face," the Star observed, "what this suit really comes down to is a petition to the court to deal with an impossible 'situation as far as *de facto* segregation' is concerned. Any school system that is 93 per cent Negro is a segregated system. Nor could this be helped to any significant extent by assigning the few remaining white children to virtually all-Negro schools away from their home areas."

The pattern for cross-transfer of children has been suggested by Harold Howe, federal commissioner of education, in his proposal that school boundaries be redrawn to mix city and suburban school children in "educational parks" housing 20,000 or more pupils.

If this is the path on which Judge Wright is embarked, and if the Supreme court should then throw its support to the scheme, what kind of legal justification might there be offered? We will tell you in another editorial tomorrow, for the "guidelines" of such a not-so-mythical decision have been forecast with great clarity and prevision on the basis of earlier Supreme court pronouncements and educational directives already in force in the city of New York.

Change in Screening Process Seen Affecting School Board

By Susan Filson
Washington Post Staff Writer

A more conservative Washington School Board may emerge this summer as a result of the appointment of U. S. District Court Judge George L. Hart Jr. to screen candidates for three Board vacancies.

Hart, who was active in Republican Party politics before his appointment to the bench, said in an interview yesterday that the 15 District Court judges who appoint School Board members rarely reject the choices of the interviewing judge or committee.

He was given the job of screening and nominating School Board candidates in a quiet administrative reshuffling within the Court last December. He replaces a three member panel headed by Judge Wililam B. Bryant that was responsible for nominating candidates last year.

With Bryant as chairman of the nominating committee, the Court broke with its previous practice of avoiding School Board candidates whose educational views conflicted with those of School Superintendent Carl F. Hansen and of automatically reappointing incumbent members.

Ann H. Stults, Benjamin H. Alexander and John A. Sessions, named to the Board last June, were supported by citizens' groups urging major changes in the school system.

Hart was chairman of the nominating committee for five years before resigning last April because he was in the hospital. Bryant replaced him.

School Board appointments made while Hart was committee chairman drew increasingly strong criticism from citizens' groups charging that the Board was geographically, economically and racially unrepresentative of Washington's population.

Chief Judge Edward M. Curran said the abolition of Bryant's committee and its replacement by Hart in December is a return to an earlier system with each judge acting as liaison with a different District government agency.

Curran said a return to the liaison system was suggested last fall by Chief Judge Richmond B. Keech as a more efficient method of dealing with District government agencies.

In December, a list of liaison jobs was circulated among the judges according to their seniority on the bench. Hart had already selected the liaison position with the School Board when the list reached Bryant, who was appointed to the Court in 1965.

"As far as I know [illegible] apply to Mrs. Roberts [illegible] one [illegible] Northwest

said, "the Court has received no complaints about School Board appointments. This action was not taken in reaction to last year's appointments or out of any desire to change future appointments."

Although the liaison system has been used during many periods of the Court's history, a committee to nominate School Board members has been in existence for at least 25 years.

Hart said, "It makes more sense to take up only one judge's time than to take up the time of three judges, even though interviewing School Board candiddates is a tremendous amount of work."

He said the Court decided last year by "a very narrow majority" not to appoint Board members to more than two consecutive terms. But Hart emphasized that the Court could change the ruling at any time.

The three Board members whose terms expire in July—Louise S. Steele, Col. West A. Hamilton and Irving B. Yochelson — have indicated they would not accept reappointment even if the Court did reverse its two-term decision.

Hart says Gloria Roberts, a former Board member who was denied reappointment last year, probably would be eligible this year. "I don't think that two-term rule would [illegible]

JUDGE HART
. . . to screen candidates

said, "because she has been off the Board for a year."

A firm supporter of Superintendent Hansen, Mrs. Roberts has not announced whether she intends to be a candidate for the Board this year.

Hart says he thinks every section of the city should have at least one representative. "Except perhaps Southwest, which has a much smaller population than the other three. But of course any able candidate from Southwest would be considered."

Five of the Board's nine members live in [illegible]

DC Schools

School Board

New Head of School Board Maps Track System Attack

By JOHN STACKS
Star Staff Writer

An attempt by the D.C. Board of Education to force the abandonment of the track system, at least in the elementary schools, appears likely before the resumption of classes in September.

The newly-elected board president, Mrs. Euphemia L. Haynes, said yesterday she thinks she can muster the support of enough board members to vote the ability grouping system out of the entire system. She said she wants to make the attempt "as soon as possible."

While other board members said they were doubtful that such support was available at the moment, some said they felt a vote against the track system on the elementary school level could succeed now.

Mrs. Haynes was elected president Friday by a 5-4 vote, but one of the members who supported her reportedly is not ready to go along with an immediate vote to abolish the system.

Support for the track system, favored by Supt. Carl F. Hansen, centers on board members who last year voted to defeat a motion by Mrs. Haynes calling for the abolition of the system.

Mrs. Haynes said yesterday she feels she can persuade these members to vote with her. "There are those who have been misled on this issue and who have not had enough time to really study the issues," she said.

The showdown appears nearly inevitable in the wake of Mrs. Haynes' election and the naming last week of three new board members, each of whom has expressed opposition to Hansen.

Study Report Awaited

Crucial to the fate of the track system are the results of a study of the entire operation of the schools being undertaken by Columbia University Teachers College. Board members say that if the study reports unfavorably on tracking, there is little doubt that it will be abandoned.

The reluctance of some members to tackle the issue now stems largely from a desire to await the study results. Hansen has committed himself to follow the recommendations of the study.

Mrs. Haynes also said yesterday that she will soon call a special meeting of the board to reach a decision on the future of the Citizens Advisory Committee on the Model School Division. Last week former board president Wesley S. Williams, at Mrs. Haynes' request, cancelled a meeting scheduled Thursday for the same purpose.

Board Defers Action

At a special meeting between the committee and the board two weeks ago, the board deferred action on a recommendation by Hansen to disband the committee and permit Norman Nickens, assistant superintendent for the model division, to name his own advisory group.

Mrs. Haynes said she is opposed to the suggestion from Hansen and will seek to have an independent committee continue to operate.

The committee, formerly headed by U.S. Court of Appeals Judge David Bazelon, has complained that it could not serve as a source of proposals and ideas without adequate funds for a professional staff.

School Board Chief To Push for End Of Track System

By Linda McVeigh
Washington Post Staff Writer

The newly elected president of the Washington Board of Education predicted yesterday that the Board will make major changes in District schools within the coming year.

Euphemia L. Haynes, elected president Friday by a 5-4 vote, said her first objective will be eliminating the controversial track system from both elementary and secondary schools.

"There has never been an intelligent discussion of that track system," Mrs. Haynes said yesterday. "I am convinced that the Board would abandon the system immediately, if there were only time for the facts, for the opinions of educators, to be presented to them."

Superintendent Carl F. Hansen favors the track system and has defended it often from Mrs. Haynes' criticism. As recently as April of this year, Mrs. Haynes moved at a Board meeting to abandon the track system. That motion died for lack of a second.

In April, 1965, after a series of public hearings on the system, the Board defeated a similar motion by Mrs. Haynes to abandon the system.

"The board has been slow to make changes in the past because we have been pressured to make decisions quickly, although we were seldom informed on the issues," Mrs. Haynes said.

She is confident now that she can win support for her proposal because the composition of the Board has changed within the past week.

On June 27, a three-judge panel from the U.S. District Court passed over all incumbents to appoint three citizens who are on record as favoring changes in the District's school system that Hansen has opposed.

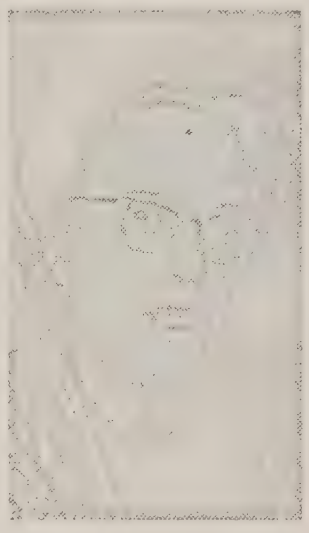
Those three new members—Benjamin H. Alexander, John A. Sessions and Ann H. Stults—have spoken out against the track system. Mrs. Haynes said she thinks she can also count on the votes of two others, whom she declined to name, on the nine-member board.

Mrs. Haynes said she intends to open discussion on the track system as soon as she meets with the three new members to determine when they will be ready to move on the matter.

"I don't intend to push this through single-handedly," she said. "That would be impossible anyway. I believe in working with the other members of the group when I am president of that group."

The track system, which separates pupils into four curriculum groups, has been upheld in the past by all Board members except Mrs. Haynes, Louise S. Steele, and Mordecai Johnson, the former president of Howard University, who was not reappointed to the Board when his term expired last year.

Some Board members whose votes Mrs. Haynes would need to abolish the track system have indicated they want to delay any action until they can study a review of the entire operation of the District schools, currently being made by Columbia University's Teachers College.



EUPHEMIA L. HAYNES
. . . wants discussion

That study will not be finished until late 1967. Both Alexander and Mrs. Stutts have said they think that any changes in the track system should await results of the Columbia study.

Mrs. Steele has said she agrees with the new members that they should wait at least until an interim report is issued by the study group.

Besides the track system, Mrs. Haynes said she will request these changes in the city schools:

- Full use of "modern" teaching methods, such as team teaching and programed instruction, to which Hansen has been opposed. "These methods aren't revolutionary anymore," Mrs. Haynes said. "They have ben tested and shown to be successful."
- A "cost effectiveness" study that would enable the Board "more realistically to evaluate" the budget submitted in August. "We have to pass on appropriations without any idea of where money has gone in the past or how our teachers and equipment are being used," Mrs. Haynes said. She will demand this study before the Board has its budget meeting next month. "I think I can get it," she said.

School Board

DC Schools

Mrs. Haynes Elected Head Of School Unit

Board 1-2-66

By Susan Filson
Washington Post Staff Writer

Euphemia L. Haynes, a persistent critic of Washington's school track system and of Superintendent Carl F. Hansen, was elected president of the city's School Board yesterday.

Haynes

Mrs. Haynes, who refused to vote for renewal of Hansen's contract in 1964, was elected at the Board's first meeting since three new members were appointed earlier this week. The secret ballot was 5 to 4.

The vote was viewed as a forerunner of the opposition Hansen's school policies may draw from the sharply altered Board this year.

"This is a Board on the move and this is the first step," said Benjamin H. Alexander, who nominated Mrs. Haynes, Alexander, one of the new appointees sworn in yesterday, says he favors drastic revision of the track system.

He stressed in his nominating speech that Mrs. Haynes' election would not be a repu-

See BOARD, A4, Col. 4

BOARD—*From Page A1*

Track System, Hansen Critic Named President of District School Board

diation of the track system of Hansen.

Hansen pledged the fullest cooperation to Mrs. Haynes and the new Board. After the meeting, he said he "does not believe Mrs. Haynes' election will affect my tenure." His contract comes up for renewal next spring.

"I've never been concerned about my position," he said. "I've done what I thought was right. Of course there's always the possibility of criticism."

May Divide on Issues

Asked whether he thought the Board would make major changes in the track system this year, Hansen said "anything can affect the track system."

There were indications after the meeting that the new members, all of whom have been critical of present school policies, and old Board members who have criticized Hansen in the past, will not agree on every issue.

Both Alexander and Ann H. Stults, another new member, said they thought that any changes in the track system should await results of a $265,000 study of the school system to be conducted by A. Harry Passow of Columbia Teachers College.

"This is such a complex issue," Mrs. Stults said, "that it seems only reasonable to wait for the results of a study that will surely focus very strongly on the track system."

Awaits Interim Report

Louise S. Steele, a Board member since 1960 and one who has frequently been critical of Hansen's policies, said she agreed with Mrs. Stults. "I understand there is going to be an interim report on this in a few months, I would prefer to wait and consider any changes then."

Mrs. Haynes said she "certainly hoped changes in the track system wouldn't wait until the study is over."

Alexander said "obviously, those of us on the Board who generally think somewhat alike on these issues won't always agree. But this doesn't mean we won't agree a good deal of the time and work together effectively."

Mrs. Haynes, one of four Negroes on the Board, has been a member since 1960. She will serve a one-yea term as president.

Mrs. Haynes retired fro teaching in 1959 after 40 yea with the Washington schoo She was a professor of math matics at D.C. Teachers Co lege for 30 years and head the mathematics departme at the time of her retirement.

Mrs. Haynes, Track Critic, Elected School Board Head

By JOHN STACKS
Star Staff Writer

Mrs. Euphemia L. Haynes, a firm opponent of the school track system, today was elected president of the D.C. Board of Education.

In the first test of voting strength since the board acquired three new members this week, Mrs. Haynes defeated Irving B. Yochelson in a 5-4 vote.

Benjamin Alexander, one of the three new board members placed Mrs. Haynes' name in nomination. He said the nomination of the former D.C. Teachers College professor was not "a repudiation of the track system nor of Supt. Carl F. Hansen."

"This is a board that is on the move and this is the first step," Alexander said.

Mrs. Haynes, one of the board's four Negro members, was appointed to the board in 1962 and was reappointed last year to her second three-year term. She will serve a one-year term as president.

Opposition Seen Rising

The Rev. Everett A. Hewlett, also a Negro, nominated Yochelson. West A. Hamilton, a 20-year veteran on the board, was nominated for president by Yochelson but declined and said that he supported Mrs. Haynes.

Mr. Hewlett was later elected vice president.

The outcome of today's secret-ballot voting was viewed as an indication of the strength of opposition which Hansen and his policies may face in the next year. The three new board members—Alexander, John A. Sessions and Mrs. Walter B. Stults—all have been associated with school policies opposed to Hansen's.

Mrs. Haynes last year introduced a motion to abolish the

Picture on Page A-14

The new board president retired from teaching in 1959 after a 47-year career in the District schools. She served 30 years as a professor of mathematics and as head of the math department at D.C. Teachers College and previously taught at Dunbar and Armstrong High Schools.

Mrs. Haynes received her bachelors degree from Smith College in 1914, her masters degree from the University of Chicago in 1930 and her doctorate from Catholic University in 1943.

Her husband, Harold A. Haynes was deputy superintendent of the District schools until his retirement in 1958.

7-1-66

Haynes — bio.

DC Schools

DC Schools-general 7-7-66 (Copy)

Board Rejects Offer Of Hansen to Quit

By JOHN STACKS
Star Staff Writer

District School Supt. Carl F. Hansen made an informal offer to resign last week, but the offer was rejected by the Board of Education, it was learned yesterday.

According to reliable sources, Hansen told the board in an executive session last Friday that he would resign immediately if the board wished or would resign effective in six months so a replacement could be found.

Hansen's move followed the election of Mrs. Euphemia B. Haynes as president of the board after the appointment of three new board members. She has been a consistently vehement critic of the superintendent.

The election of Mrs. Haynes was the first indication that Hansen may face strong opposition to many of his policies from the board. He is reported to have said he would resign if his presence would divide the community.

In refusing to consider Hansen's offer to resign, the board ended rising speculation that the superintendent may be on his way out. Several board members said yesterday they know of no attempt among board members to oust Hansen.

Benjamin Alexander, one newly appointed member, said yesterday that Hansen will stay "as long as he follows the policies set by the board." While refusing to comment on what took place at last week's meeting, he said he feels the board will be "extremely strict" in asking Hansen to follow its policy line.

Other board members refused to comment directly on Hansen's offer and Hansen also declined comment.

The superintendent's third three-year contract expires next spring.

The main assault on his policies is expected to center on the track system of ability grouping. He has consistently defended the system, but Mrs. Haynes said last week she wants to abaondon tracking "as soon as possible."

While the majority of the board does not appear ready to vote down the track system in all schools, several members said they think there is already support for abandoning tracking in the elementary grades.

A shift of power on the board came last week with the naming of the three new members. Each of the new appointees has taken positions contrary to those held by Hansen on key education issues.

The superintendent's reaction to the possible board rejection of his policies is expected to be the central question when his contract comes up for renewal in the spring.

Ask Haynes about this?

School Board Hansen

Contract Expires Next Year 7-8-66 Post

Hansen Offers Informal Resignation, Leaving New School Board a Choice

Washington School Superintendent Carl F. Hansen has told the city's new Board of Education that it needn't honor his contract if it doesn't want to, sources reported yesterday.

Though no Board member would discuss the matter publicly, it was learned that Hansen submitted an informal, pro forma resignation to the new Board, much the way Government officials do when administrations change.

The move came during a closed session last Friday, at which Hansen reportedly told the Board that differences of opinion might arise and that they should be recognized when they develop.

Hansen's third three-year contract expires next spring, and the Board refused—for now, at least—to take him up on the offer to leave. Members said they know of no move to oust him.

The confidential discussion followed the election of Euphemia B. Haynes as president of the Board after three new members were appointed.

Mrs. Haynes has been a strong critic of Hansen's policies, expecially his development of the city's track system.

Another new Board member, Benjamin Alexander, called for an end to community criticism directed at Hansen, stressing that the Board will take responsibility for all policies now.

"I feel that any superintendent of any school must follow the policies set by a majority of any school board," Alexander said.

"The superintendent sits in on all Board meetings and can question in these meetings at will. However, when a policy decision is made by a majority of the Board—whether the superintendent agrees with this policy or not—he must implement this policy."

If people must criticize the school system, Alexander said, "the criticism in all fairness should be directed at the Board.

"It is not Dr. Hansen's track system, but the Board of Education's track system, and it should be so called until eliminated or kept."

School Board - School Suit - ACT - SCHOOLS
18

Choosing the District Board of Education

One View: Good Will and Devotion Are Not Enough

By J. W. Anderson

Adopted in 1906

WHATEVER method Washington uses to choose its future School Boards, the city can be confident that any change in the present system will be an improvement.

Ever since 1906, the District of Columbia School Board has been appointed by judges, and currently by the 15 judges of the Federal District Court here.

The appointees are people of good will and devotion to the public interest; the job requires at least the equivalent of a full week's work every month—some members give it their full time. The pay is zero.

But good will and devotion are not enough. The School Board needs to understand the city's rising demands on the schools. It needs to represent the city in directing the school system's professional administrators.

Our present Board is totally unrepresentative of the city's population geographically, socially, economically and racially.

Secretive and eccentric, the present system of appointing Board members discriminates:

- Against the central core of the city, where most of the children live.
- Against neighborhoods of merely average income levels, let alone the genuinely poor ones.
- Against the critics of the School Superintendent and the existing school policies.

The Federal judges are required by law to give three of the Board's nine seats to women. But tradition alone sets the racial balance. For 56 years the Board was carefully maintained at a formula of four white men, two white women, two Negro men and one Negro woman.

In 1962 the judges took the not very daring step of replacing one of the white men with Mordecai Johnson, the retired president of Howard University. Three years later, when his term expired, the judges refused to reappoint him. They maintain a stony silence in these delicate matters, but the reason obviously was Johnson's increasingly intemperate attacks upon his colleagues and particularly the School Superintendent, Dr. Carl F. Hansen.

That action left the judges with the problem of finding a replacement for Johnson.

Some of the names before them were: Sterling Tucker, outspoken executive director of the Urban League; Professor Herman Branson, the Howard physicist who was serving on the advisory committee of the experimental Cardozo Model School Division; Julian Dugas, director of the antipoverty program's Neighborhood Legal Services.

The judges do not like to appoint people who are known as critics of the status quo in the school system. (The School Superintendent seems to exert a certain influence, directly or indirectly, over the selection.)

They chose the Rev. Everett A. Hewlett, also a Negro, who lives at the easternmost tip of the District. He had been active in local PTAs, but never had taken an audible part in the citywide controversy over the schools.

But the judges declined to name a fifth Negro,

Continued

School Board -18— School Suit ACT- Schools

The School Board meets.

Board Continued

to make a majority.

It is ironic that the Federal courts ordered the desegregation of the District's schools 12 years ago, but the judges still deliberately perpetuate the white majority on the School Board. Ninety per cent of the city's public school children are now Negro, and 61 per cent of the city's population is Negro.

The same double standard is visible in the issue of geographical representation. Federal courts all over the country are turning state and even local governments upside down in reapportionment cases, insisting upon the rule of one man, one vote. But here in Washington, Federal judges are enforcing a geographical pattern of School Board representation that is a classic of malapportionment.

Geographical representation

The far northwestern corner of the District, west of 16th street and north of Woodley street, contains barely one-twentieth of the city's population. But five of the nine School Board members live there.

The central core of the city gets even shorter shrift. Seven of the nine Board members live within easy walking distance of the District line. The other two live, respestively, in Cleveland Park and off Rock Creek Park. The grey, crowded center of the city has no representation at all.

Hewlett is the only one of the nine Board members who has a child currently in the city's public schools. He is also the only one who lives in a neighborhood where the general level of incomes is below the city average. The other eight all live in neighborhoods where the income level is far above average.

The Board is also skewed politically. The only District court judges with wide local contacts happen to be the two who were successively chairmen of the city's Republican Committee during the Eisenhower years.

That explains why five of the nine School Board members are drawn from the one-sixth of the District's voters who are registered Republicans. (School Board President Wesley S. Williams is a vice chairman of the Republican Central

Continued

Carl Hansen

Political Representation

Board Continued

Committee.)

Partisan politics never controls the Board, but the political balance helps explain the deeply conservative character of the Board on social issues and money.

The District's School Board, like most school boards, spends most of its time worrying about money.

But the most urgent responsibility now before it is to induce the heirarchy of professional administrators to accept and use the new concepts of education. As the basic requirements for employment in this white-collar city steadily rise, and as the schools are increasingly required to hold children to graduation, a whole new style of education is going to be required in the slums.

Most of the present Board give no indication that they have grasped these new ideas. They are, after all, ideas needed for the slum schools, and not many of the present Board knows much about life in the grim and crowded slums of Washington. In these matters they tend to look to the school administrators, the people whom they are supposed to be leading.

Three of the members' terms expire each June. Even if Julius Hobson's suit to prohibit the judges from appointing School Boards has not been settled by then, the judges have it in their power to alter the complexion of the School

Continued

J. W. Anderson has been an editorial writer for the Post for the past five years, writing chiefly about the city and its troubles. Previously he was a reporter, assigned to the Maryland suburbs.

suit-18 ACT-Schools

School Board

Board Continued

Board.

While Williams and Mrs. Roberts can expect reappointment, Dr. McLendon has been ill and may not accept another term. If he is replaced by a forceful man, equipped to speak for the central city, the evolution of the School Board will have begun.

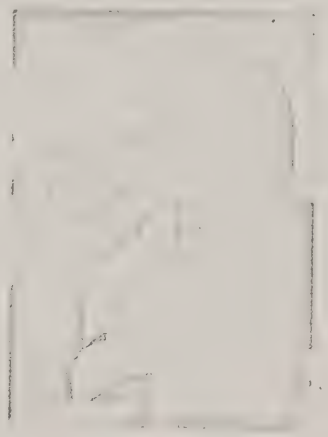
Whatever the final resolution of the present legal suit, it will have shown the city how badly its Board has been gerrymandered.

Hobson's suit may well go to the Supreme Court. If it ultimately succeeds, it will at the very least return the control of the School Board to the District Commissioners, who held it before the present system was adopted in 1906.

But the courts might even conceivably grant the relief that Hobson asks: the ballot box. Hobson thinks that the Washington School Board ought to be elected, like most other big-city school boards throughout the United States.

If Hobson wins his case, the whole city will join him in the celebration. For the first time in the history of the School Board, the city's public schools will be firmly in the hands of the taxpayers and the pupils' parents.

Members Whose Terms End in June



WESLEY S. WILLIAMS is a lawyer and an active Republican who was appointed to the Board 15 years ago. He was vice president in 1961, when Walter Tobriner was appointed District Commissioner, and succeeded to the presidency. His wife is a teacher in the District schools. Williams appears to be assured of reappointment and reelection to the presidency. He has publicly supported elected School Boards.

MRS. GLADYS K. ROBERTS was vice president of the District Congress of PTAs when she was appointed to the Board in 1960. She was briefly a substitute teacher in the District schools, and her daughter, now in college, went through the District schools from beginning to graduation. She has played a passive role in the Board. She will accept reappointment and is likely to get it.

DR. PRESTON A. McLENDON is a distinguished pediatrician, professor at George Washington University's Medical School and former president of the District Medical Society. Dr. McLendon was appointed to the School Board in 1957. He took the job out of a conviction that the Board needed a medical man. He has been ill this spring, and is 73 years old. He may not accept another term.

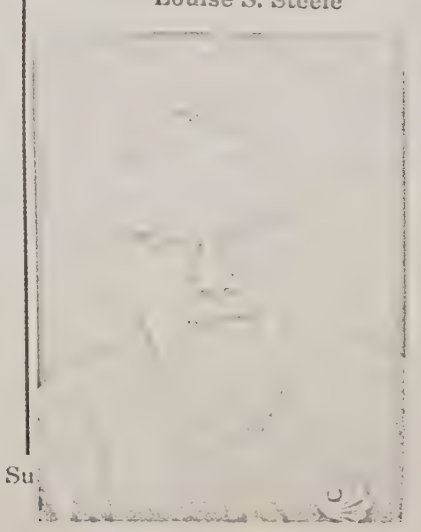
Meet the Other Members

Carl C. Smuck

West A. Hamilton

Louise S. Steele

Everett A. Hewlett



Euphemia L. Haynes

Irving B. Yochelson

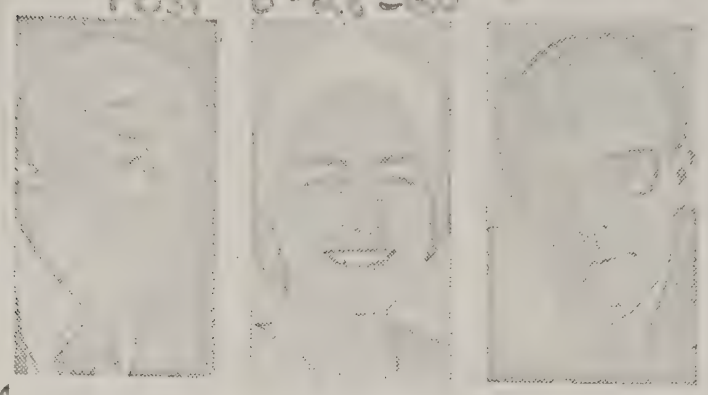
The Washington

Richard Board

School Board

Three Advocates of Changes Named to City School Board

Post 6-27-66



Alexander Mrs. Stults Sessions

The Washington Post

. . . three who were appointed to D.C. school board

Policy Shift Looms As Incumbents Are Passed Over

By Gerald Grant
Washington Post Staff Writer

Federal judges reshaped Washington's School Board yesterday.

In a major transfusion, they passed over all incumbents to appoint three citizens who are on record as favoring changes in the District's school system. Named to three-year terms by Chief Judge Matthew F. McGuire were:

- Benjamin H. Alexander, 44, a research chemist who said he favors "drastic revision of the track system" used in all city schools.
- John A. Sessions, 47, an education specialist for the AFL-CIO who thinks the school system should be restructured into 12 educational parks.
- Ann H. Stults, 42, a school parent who is active in the League of Women Voters and D. C. Citizens for Better Public Education. She feels the schools need a broad range of new teaching techniques.

School officials said that it was the first time in memory that the judges swept past all incumbents in appointing members.

The terms of the three members of the nine-member Board expire June 30. Wesley S. Williams, the first Negro Board president who was appointed a member 15 years ago, took himself out of the race last week.

Dr. Preston A. McLendon, though 73 and ailing, was up for reappointment. So was Gloria K. Roberts, a former P-TA official who was first appointed in 1960.

The new members were selected by a three judge panel of the U.S. District Court chaired by Judge William B. Bryant. The selections were ratified by the full Court which is charged with making School Board appointments here.

This selection system has

See BOARD, A8, Col. 1

BOARD—*From Page A1*

3 Critics of Pr[illegible] Are Appointed to D.C. School Board

been attacked as "unconstitutional" by ACT, a militant civil rights group. Its suit is still pending. Other efforts are under way to secure an elected School Board through home rule or under separate legislation in Congress.

The injection of the new blood into what some have charged is a tired board answers criticisms raised frequently in recent years.

One complaint has been that the Board has been deaf to community demands. The new members are identified with groups that have argued for major changes in school policies.

"They are a ray of light and hope," commented Chief Judge David L. Bazelon of the U.S. Court of Appeals here (which had no role in selecting Board members).

Bazelon, a frequent critic of the schools as chairman of the Cardozo area model school advisory committee, said the new members were outspoken themselves and would "provide a good ear for any future community criticism of the schools."

In a related action yesterday, Board member Euphemia L. Haynes asked outgoing president Williams to postpone a June 29 meeting at which the future of Judge Bazelon's committee is to be discussed. In a telegram to Williams, she argued that it would be "unseemly" to decide the fate of Bazelon's group on the eve of a major shift in the makeup of the board.

The new members are younger (all in their 40s) and two have children in the schools (Alexander and Mrs. Stults). Most of the members of the current board are over 50 and only one, the Rev. Everett A. Hewlett, has a child in the schools.

The Board has been predominantly conservative (a majority are registered Republicans), while the new appointees have espoused liberal causes.

The judges apparently recognized the criticism that too many of the current board members live west of Rock Creek Park. While Mrs. Stults does, Alexander lives in Northeast and Session lives on Capitol Hill.

However, the judges ignored voices pressing for a Negro majority on the Board. They appointed only one Negro, Alexander, who in effect replaces Williams. This leaves the board with four Negroes and five whites.

The appointments will sharply alter the style of a Board that has in the past avoided controversy as much as possible. Only two members of the old Board, Mrs. Haynes and Louise S. Steele, would question or oppose policies set by Superintendent Carl F. Hansen.

Mrs. Haynes refused to vote to renew Hansen's contract the last time around and moved to abolish the tracking system he favors.

While the new members are all on record as favoring changes in the track system, they are not likely to join any movement to oust Hansen. But they will call the tune for the man who succeeds Hansen when he retires (he is now 60).

Hansen declined to comment on the appointments, explaining "Since these three people are replacing three who are leaving, anything that I say would be regarded as a comparison."

One of the first indications of the temper of the new board will come at the July 1 meeting at which a new board president will be elected to replace Williams. Board members who were polled yesterday were uncertain whether current Vice President Carl C. Smuck would get the nod.

Another crucial issue will be how the new board handles the controversial track plan.

The track system, which separates pupils into four curriculum groups on the basis of their I.Q. and achievement scores, has been upheld in the past by all members except Mrs. Haynes, Mrs. Steele and Mordecai Johnson, the former president of Howard University who was not reappointed to the Board when his term expired last year.

Alexander said in an interview yesterday that he favors drastic modification in the track system.

Sessions said he thinks the only kind of track system that works is one "that has an individual track for every child." He wants to see widespread use of team teaching and upgraded teaching plans that allow children to progress at their own pace.

Mrs. Stults said she thinks "changes are needed" in the track system and looks for guidance to the study of the problem by Teachers College at Columbia University.

Mrs. Stults also said she would like to see "vastly expanded teacher training programs" with citywide expansion of some of the new teaching methods that are being tried in the Cardozo area schools.

A Vassar graduate who worked for the Elmo Roper Opinion Polls organization after college, Mrs. Stults's more recent activities have included marching on the picket line with members of the D.C. Coalition of Conscience to protest Welfare Department policies.

She has two sons in District schools (Murch Elementary and Deal Junior High), was chairman of the education committee of the League of Women Voters and a member of several other education groups.

Sessions, formerly an English professor at Cornell University, has served in various education posts with the AFL-CIO since 1954.

He says that most of Washington schools are so old and dilapidated that they should be abandoned. He favors setting up 12 campuslike educational parks that would provide the kind of school plant that's needed and also aid integration.

Sessions is a member of the Americans for Democratic Action and D.C. Citizens for Better Public Education. A bachelor, he lives at 658 Independence ave. se.

Alexander, who expressed surprise at his appointment, would take a number of new steps, including giving contracts to universities to run some ghetto schools on an experimental basis.

The Walter Reed research chemist is a graduate of the University of Cincinnati and earned his doctorate at Georgetown University. He has a son in city schools and a daughter who soon will be.

Alexander has been active in the local NAACP chapter and the D.C. Congress of Parents and Teachers. He lives at 2522 South Dakota ave. nw.

Statement of Joseph Mulloy to Judge James Gordon
Federal Court in Louisville, Ky. April 8, 1968

I stand before you today for refusing to kill. For refusing to partake in the violent march of history which will eventually, if not stopped, end us all. It is ironic that I stand here today in these trying times speaking for peace and non-violence as the country burns down around us from the flames of hatred and violence. America seems bent upon doing itself in.

I find an intolerable hypocrisy in the words of our President in the last few days and the deeds he causes to happen. America shall not be ruled by the bullet, yet America shall rule the world with bombs and bullets. Men of peace are called upon to use non-violent methods in dealing with our internal crisis and yet our government relies solely on violence to protect our so-called interests and impose our will around the world. We shall reap what we sow as the men of non-violence are jailed and murdered.

This is the hypocrisy which I will have no part of. I have chosen the truth of non-violence as my way of life. What has gone on in this court of law and what you do to me today shall not deter me from that truth.

I accept this bitter cup because I love this country. Like Socrates, I had my chance to flee the wrath of the law but chose to face it head on with my will in the hope that I may change it. What I have done will someday be praised as a truly patriotic act and someday men will learn to live in peace and love. Until that day you can whip my body and shackle my bones but you can't touch what I think in my head. I shall always remain free and we shall overcome.

TO: Friends of SCEF, Everywhere

FROM: The SCEF Staff

RE: Jailing of Joe Mulloy and Don Pratt

Last week, Joe Mulloy---whom you read about in the February Southern Patriot---was sentenced for refusing induction into the Army. Federal District Judge James Gordon at Louisville gave him the maximum sentence: 5 years in jail, and a $10,000 fine. At the same time, another young man who had refused the draft, Don Pratt of Lexington, received the same sentence.

Both of them are in jail now. They are appealing their cases, but the judge has set bond at $12,000---a $2,000 appearance bond, plus a $10,000 supersedeas bond to cover the fine, which in effect means that if the appeal is lost they would be paying the fine in advance.

We have been told by lawyers that this is one of the severest sentences yet given in any draft-resistance case in the country. There is no doubt in our minds that the severity of Joe's sentence and the unreasonable bond result from the fact that Joe was not only resisting the draft---he was organizing other people to work against the war and to change the politics of this nation. The powers-that-be know as well as we do that Joe is an effective organizer.

When Joe's occupational deferment was ended, after he became active in organizing against strip-mining in Eastern Kentucky, he applied for conscientious objector status. He had become a conscientious objector to war and tried to explain this to the board. But they refused to even consider his request for C.O. status. This is one legal basis for the appeal: that the board did not give him a fair hearing.

Many of us attended Joe's trial. It was apparent that the board (the same one who refused to recognize Muhammed Ali as a Muslim minister and therefore entitled to deferment) could not possibly have given him a fair hearing because they had no concept of what conscientious objection is. In 17 years of operation, this draft board has never processed one C.O.

We are picketing the jail each day where Joe and Don are temporarily lodged, and many people in Louisville are protesting both the severe sentences and the ridiculous bond. But we need the help of our friends everywhere to make this protest effective.

Please send letters and telegrams protesting the sentences and bonds to the following: U.S. Attorney General Ramsey Clark, U.S. Department of Justice, Washington, D.C.; Sen. Thruston B. Morton, and Sen. John Sherman Cooper, Senate Office Building, Washington, D.C. You can write to Joe and Don c/o Jefferson County Jail, 514 W. Liberty St., Louisville, Ky.

P.S. Enclosed is a copy of the statement Joe made to the court when he was sentenced.

Report on steering committee against repression meetings March 30-31

A list of persons present at the meeting is attached. Not all those on the list were present all of the time.

SATURDAY

1) Report on Nashville meetings February 24-25. Community meetings, sponsored by the steering committee, were held in Nashville over the 24-25 week-end in response to a situation of extreme police brutality and harassment of the black community, and particularly black militants, which had occurred earlier in the month. The largest meeting, held Saturday night, attracted 250-300 people.

The steering committee meeting itself had concentrated primarily on the Rap Brown situation and what we could do about it. Plans were made for simultaneous mobilizations of protest in the black community and among peace and civil liberties activists. There was also some discussion of the new Eastland Bill S. 2988 and the investigation projected by the Eastland Committee -- and it was agreed that we should also begin to mount an offensive against this.

2) Results of Nashville. Don Stone reported on activities in the black community. March 20 had been set as an international day of protest of Rap's illegal arrest and racial oppression, and in support of black liberation. Demonstrations were held in many cities around the country---and around the world. Coverage in the white commercial press was virtually nil. SNCC received reports of activities in LA and the Bay Area on the West Coast, in Atlanta, Durham, New York, etc. and in Paris and Stockholm. Messages came from the NLF, Vietnamese students in Paris, Puerto Rico, Guyana and elsewhere. Aframerican News Service carried the news in full.

Barbara Flynn reported on the meeting held March 9 in New York to involve peace and civil liberties people. About twenty-five organizations -- NMC, WSP, SMC, ACLU, NLG, ECLC, etc. -- were represented in addition to several of the steering committee groups -- SNCC, CORE, SCEF, Highlander, DM and LCCR. Discussion centered on the statement initiated by the steering committee -- getting it around and publicizing it. Most of the groups agreed to do mailings to their memberships for additional signatures -- with their own action suggestions -- such things as telegrams, phone calls to Rap, demonstrations on the 20th, etc.. A press conference to publicize the statement and opposition to Rap's persecution was set for the following Thursday, with the NMC to co-ordinate. It was felt that time was too short to plan joint action for the 20th --- but people agreed that each of the organizations should do what they could. A continuations committee was set up to plan the press conference and call another meeting on repression.

Bob Greenblatt of NMC reported on the press conference and further developments in New York. The consensus of the people who were there was that the conference itself was really good -- a lot of good (not to mention newsworthy) people were there -- Mrs. Brown, Forman, Cleve Sellers, Dellinger, Pemberton, Cleve Robinson, Kunstler, etc. etc. -- and all the papers, wire services, radio and tv networks. And there were some very good statements and interviews. But coverage was terrible. A small story was buried in the times. Nothing on radio or tv. The feeling of the people who had set up the conference and of the steering committee was that this was clearly a deliberate black-out and that orders had come down from somewhere very

high up to accomplish this.

Then followed some discussion of the commercial press in general and the need for us to make full use of movement newspapers, etc.. Barbara Flynn was asked to write the Underground Press Syndicate, Liberation News Service, Clergy Concerned and other groups for their press lists and to circulate these to the steering committee organizations. It was suggested that we get the statement with the full list of signers, ANS material, the suppressed section of the Kerner report dealing with Cambridge, Md. (which vindicates Rap) and other information relating to Rap's situation to movement press. Also that we produce a short attractive brochure on the issues in the case for distribution to other movement groups. Final decision on this was left till a full discussion of the situation and our own future plans on this could take place when Kunstler was present.

Greenblatt then reported on post-press conference developments in New York. Several student groups had had activities on the 20th. Another meeting of the same groups that met March 9 was set for April 7. Outlook for a continuing coalition along the lines of the steering committee: some question as to this due to problems of over-commitment to peace demonstrations and so forth; most of the people that could do the job of pulling this together already over-burdened it seems. . . There was some discussion of this and it was agreed that the NY folks should be encouraged to maintain a regular coordinating thing. It was suggested that we try to send someone to the April 7 meeting and that Barbara write to them.

Barbara Flynn then reported on developments in the Nashville community since the February 24-25 steering committee sessions there. On Saturday night, a number of people had signed up for a follow-up meeting, which was held March 1. Dennis Roberts of the Law Center came down to help with plans for a suit against the National Guard -- which was scheduled to hold a "practice riot" in North Nashville (right between Fisk and A&I) March 9. About fifty people were at the meeting and they decided to work on the injunction. Within a few days they had collected 500 plaintiffs, mainly from the black community, and on the morning of March 8 the suit was brought into federal court by Karen Ennis, a local ACLU lawyer. The judge told Karen that he could do one of two things -- either issue a temporary restraining order or set up a "show cause hearing" (at which the Guard would have to explain their plans) -- and that she should phone him in the afternoon to find out his decision. Soon afterward, it was announced on the radio that the National Guard had cancelled its plans to hold "riot practice" in North Nashville and would instead conduct maneuvers in a thinly populated area outside the city limits (an open field). When Karen called the judge that afternoon he told her that he had decided to dismiss the suit. But the injunctive action had already served its purpose, for the Guard had been forced to back down. Now people in Nashville are working on citizens' patrols (people's surveillance of the police) which have been successful in some other cities.

3) Carl Braden reported on the passage of a bill by the General Assembly of Kentucky to set up a "little HUAC" in the state -- the Kentucky Un-American Activities Committee or KUAC (pronounced "quack") -- and the movement's offensive against this. SCEF, SSOC and SDS and several local groups and individual plaintiffs have filed a suit against the committee. SCEF and some of the other plaintiffs are getting to other folks on this issue, and will collect a number of "intervenors" at the same time as they

do an education job. The Governor of Ky., Louie B. Nunn, who was elected on a platform of running the Bradens and other "subversives" out of the state, let the bill become law without adding his signature (because he was intimidated by the suit??) , but even since the suit was filed has made numerous outrageous statements in support of KUAC. Personnel for the committee has not been selected yet, and SCEF and the other organizations which operate in Ky. are not calling for help from the steering committee so far

4) Walter Bishop gave a report on a situation of extreme police intimidation and harassment of the black movement in Knoxville. Six or seven of the most militant students at Knoxville College (a black school run by the Presbyterian Church) are in jail on various charges as a result of their political activity on campus. The students are accused by the power structure of having killed a cab driver whose body was found not far from the campus several weeks ago. The actual circumstances surrounding his death are unclear; what is clear is that the students have been jailed on account of their politics. Legal help is needed, and a black organizer. DonStone will get Stanley Wise, who has been in touch with KC, to go in, and the Law Center will find someone to go with him. Highlander folks are working on the white community. Possibility of having the next series of workshops and the steering committee meeting itself in Knoxville was discussed. Final decision on this to be made later, after consideration of Memphis.

SUNDAY MASS MEETING

About 120 people were there, from nineteen different Mississippi counties. Don Stone, Kunstler, and Dellinger spoke as steering committee people from outside the state, Guyot and Owen Brooks as Mississippians working in the steering committee, two guys from Memphis -- J.W. and George Trotter -- talked about recent events there, and people from the various Miss. counties reported on repression in their local communities. Also Howard Spencer from Tougaloo talked about repression on the black campuses. There was a lot of good discussion and Miss. folks decided to set up their own statewide steering committee against repression.

SUNDAY EVENING STEERING COMMITTEE MEETING

1) Bill Kunstler reported on what's been happening with Cleve Sellers' case. Cleve is now out on $20,000 bond, but he faces a possible total of 84 years in prison. Howard Moore is appealing his draft conviction and the Law Center is bringing a suit to stop <u>all</u> the Orangeburg prosecutions.

2) Further discussion on Rap Brown. Bill reported that the La. bond has been posted (the judge has not imposed any new travel restrictions -- Rap will have to inform the court when he plans to leave New York, but will not be confined there by La. orders at any rate) and is being taken to Richmond. Rap has lost forty lbs. since the start of his fast. (Don Stone mentioned that SNCC has gotten a number of people and groups around the country to write to Rap, asking him to halt his fast because he is more valuable to the movement alive and well than otherwise. Suggests folks do this.) A hearing to stay the order of the judge revoking the bond and ordering him into custody in Va. -- or to have new bond set -- will take place soon. If this is lost, the fight against extradition proceedings will probably be waived and Rap will be taken to Maryland. Apparently the Md. authorities do not want to keep him there for long: the situation

in Cambridge is tense and Mrs. Brown has said she will lead a motorcade. In light of the suppressed section of the Kerner report and the local Cambridge situation, it is probable that Rap will be out of jail before too long.

But the situation is still very serious. As of now the gun charge trial is set for May 13 and a trial on the intimidation thing is likely to follow. The gun charge has two counts, the intimidation charge has three, and each count is five years. So Rap could be locked up for twenty-five years. It was decided that what we need now is a pamphlet with some background material (the Kerner report stuff, history of the case, the travel restrictions, the statement publicized at the press conference, etc.) but stressing the illegality of the charges. SCEF will do this, send it out to the steering committee organizations for their approval, then mail to movement press and organizations. From now on, our political fight should center more on the charges than the bail or travel restrictions.

3) Further discussion of Knoxville. Walt Bishop is to write up a synopsis of the situation and send it around to all the groups. Stanley Wise will go in with someone from the Law Center (probably Percy Julian). If national publicity, telegrams etc. are in order, they will let us know.

4) Discussion of Memphis. (The Trotter brothers had had to leave after the mass meeting, but had talked extensively with Kunstler and Brooks, who reported on their conversation.) Legal help is needed -- the Law Center will send someone. All steering committee organizations to send representatives to a meeting (within the next week or so) with Memphis movement leadership which the Trotters will set up. (They will contact Owen as to date, place etc. and Barbara will notify the others.) It was agreed that the role of the steering committee should be as in Nashville -- that is to say we should concentrate on dissemination of information and not get hung up in trying to substitute for grass roots leadership. Ed King pointed out that the SRC had issued a report (title: "More Than a Garbage Strike" -- available from SRC, 5 Forsyth St. NW, Atlanta) just prior to the outbreak prophesying trouble there. Also giving an analysis of the problems there.

5) Kunstler reported that the Law Center is working with a number of groups around the country on a suit against the Selective Service System. They hope to get 10,000 plaintiffs to participate in this action. Any of the steering committee groups that want to work on it are invited. It would be especially good to get a lot of plaintiffs from Miss.. Monica Klein and others from LCDC will see about this.

6) Discussion of Eastland Bill and investigation. Barbara reported that NCAHUAC has prepared an analysis of the Eastland Bill (copies of this were sent to all steering committee groups in mid-March); and NCAHUAC regional offices are sending it to their key contacts (SRO has distributed 250). Letters have been sent to other groups asking what they are doing (ECLC, ACLU etc.). Perhaps we can do something in DC on this before long -- combining presentation of the petitions against the investigation with a press conference on that and the bill -- and Eastland in general. It was felt that intensive discussion and definite plans on this should be post-poned until another meeting, but that we should in the meantime get as much material on Eastland as possible. Owen or Rims Barber will call Vic Ullman in Toledo to get his stuff, Barbara to write Nick Kotz of the Des Moines Register for his. Guyot

or Owen will ask Joe Harris to work with the Patriot staff on a pamphlet. This could be distributed and publicized at same time as opposition to investigation and bill.

7) Discussion on affirmative action in Spock, Coffin et al case. One of the defendants (Ferber) has asked the Law Center to draw a complaint and to get various organizations involved in it as was discussed at our Atlanta meeting February 1. Bill will send the draft complaint to the steering committee groups as soon as it is ready.

8) There was some discussion as to the participation of SCLC and CORE in the steering committee. Both organizations have continued to express their interest in the work of the steering committee -- but neither has been very regular about sending folks to the meetings. Problem: how to involve them more actively?

9) It was decided that we should approach SCLC with the idea of making opposition to repression a part of the Poor People's Campaign. The steering committee would like to promote certain specific demonstrational (for example: a delegation to the Justice Department protesting the persecution of Rap Brown, Cleve Sellers and others; one to the Senate re the Eastland and McClellan Committees; etc.) and educational (workshops, speeches) in DC at this time. Barbara to draft a letter to the SCLC leadership and the steering committee of the Poor People's Campaign. Further discussion on this at emergency meeting in Memphis.

10) Dave Dellinger gave a short report on the March 22-23 Chicago meeting re plans for the Democratic National Convention -- for the information of the steering committee organizations.

11) It was decided to keep on inviting Dellinger and Greenblatt to our meetings and to make SDS part of the steering committee.

12) The next meeting of the steering committee was set for the week-end of May 4 and 5. Either in Knoxville or Memphis. Decision on this to be made at emergency meeting in Memphis.

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People who attended the steering committee meeting: Barbara Flynn (SCEF), Mary Britting (SCEF), Bob Lewis (Comm. for Free Elections in Miss., atty.), Ed King (DM, FDP), Carl Braden (SCEF), Armand Derfner (LCDC), Monica Klein (FDP, LCDC), Liz Leavy (FDP support committee DC), Charles Horowitz (DM, FDP), Solomon Gort, Jr. (DM), Rims Barber (DM), Bob Greenblatt (NMC), Dave Dellinger (NMC), Don Stone (SNCC), Roger Smith (DM), H. J. Kirksey (FDP), David Doggett (SSOC), William I. Peltz, Buford Posey, Catherine J. Webb (DM), Walter Bishop (Highlander), Owen Brooks (DM), Lawrence Guyot (FDP), William M. Kunstler (LCCR)

From the desk of

SELMA K. TRAUBER

Date_____

To_____

This is only partial-
opinion - (by order)
Bill Higgs has
latest opinion &
will bring it
with him -

more than a "cooperative antenna" employed in order to ameliorate the image on television screens at home or to bring the image to homes which, because of obstacles other than mere distance, could not receive them. But such a description will not suffice for the case in which a CATV has picked up the signals of a licensed broadcaster and carried them beyond the area—however that area be defined—which the broadcaster normally serves. In such a case the CATV *is* performing a function different from a simple antenna for, by hypothesis, the antenna could not pick up the signals of the licensed broadcaster and enable CATV patrons to receive them in their homes.

Buck v. *Jewell-LaSalle* may not be an altogether ideal gloss on the word "perform," but it has at least the merit of being settled law. I would not overrule that decision in order to take care of this case or the needs of CATV. This Court may be wrong. The task of caring for CATV is one for the Congress. Our ax, being a rule of law, must cut straight, sharp, and deep; and perhaps this is a situation that calls for the compromise of theory and for the architectural improvisation which only legislation can accomplish.

I see no alternative to following *Buck* and to holding that a CATV system does "perform" the material it picks up and carries. I would, accordingly, affirm the decision below.

ROBERT C. BARNARD, Washington, D.C. (R. MICHAEL DUNCAN, STEPHEN R. BARNETT, E. STRATFORD SMITH, CLEARY, GOTTLIEB, STEEN & HAMILTON, and SMITH, PEPPER, SHACK & L'HEUREUX, with him on the brief) for petitioner; LOUIS NIZER, New York, N.Y. (GERALD MEYER, GERALD F. PHILLIPS, LEONARD S. BAUM, LAWRENCE S. LESSER, and PHILLIPS, NIZER, BENJAMINS, KRIM & BALLON, with him on the brief) for respondent; MICHAEL FINKELSTEIN and MARTIN E. FIRESTONE filed brief for All-Channel Television Society, as amicus curiae, seeking affirmance; WARNER W. GARDNER, WILLIAM H. DEMPSEY, JR., RICHARD M. SHARP, DOUGLAS A. ANELLO, and SHEA & GARDNER filed brief for National Association of Broadcasters, as amicus curiae, seeking affirmance; IRWIN KARP filed brief for The Authors League of America, as amicus curiae, seeking affirmance; AMBROSE DOSKOW, SYDNEY M. KAYE, ASA D. SOKOLOW, JOSEPH W. GELB, and ROSENMAN COLIN KAYE PETSCHEK FREUND & EMIL filed brief for Broadcast Music, Inc., as amicus curiae, seeking affirmance; LEONARD ZISSU, ABRAHAM MARCUS, and ALAN J. STEIN filed brief for Screen Composers Association of the United States of America, as amicus curiae, seeking affirmance; HERMAN FINKELSTEIN, SIMON H. RIFKIND, JAY H. TOPKIS, PAUL S. ADLER, and PAUL, WEISS, RIFKIND, WHARTON & GARRISON filed brief for American Society of Composers, Authors and Publishers, as amicus curiae, seeking affirmance; PAUL P. SELVIN, WILLIAM BERGER, SELVIN AND COHEN, WILLIAM B. HAUGHTON, and MORTIMER BECKER filed brief for Writers Guild of America, Screen Actors Guild, Directors Guild of America, and American Federation of Television and Radio Artists, as amici curiae, seeking affirmance; ERWIN N. GRISWOLD, Solicitor General, filed brief for the United States, as amicus curiae, seeking reversal in part; BRUCE E. LOVETT and GARY L. CHRISTENSEN filed brief for National Cable Television Association, Inc., as amicus curiae, seeking reversal.

No. 645.—October Term, 1967.

Joseph Lee Jones et ux., Petitioners, *v.* Alfred H. Mayer Co. et al. | On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

[June 17, 1968.]

Mr. Justice Stewart delivered the opinion of the Court.

In this case we are called upon to determine the scope and the constitutionality of an Act of Congress, 42 U. S. C. § 1982, which provides that:

> "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."

On September 2, 1965, the petitioners filed a complaint in the District Court for the Eastern District of Missouri, alleging that the respondents had refused to sell them a home in the Paddock Woods community of St. Louis County for the sole reason that petitioner Joseph Lee Jones is a Negro. Relying in part upon § 1982, the petitioners sought injunctive and other relief.[1] The District Court sustained the respondents' motion to dismiss the complaint,[2] and the Court of Appeals for the Eighth Circuit affirmed, concluding that § 1982 applies only to state action and does not reach private refusals to sell.[3] We granted certiorari to consider the questions thus presented.[4] For the reasons that follow, we reverse the judgment of the Court of Appeals. We hold that § 1982 bars *all* racial discrimination, private as well as public, in the sale or rental of property, and that the statute, thus construed, is a valid exercise of the power of Congress to enforce the Thirteenth Amendment.[5]

I.

At the outset, it is important to make clear precisely what this case does *not* involve. Whatever else it may be, 42 U. S. C. § 1982 is not a comprehensive open housing law. In sharp contrast to the Fair Housing Title (Title VIII) of the Civil Rights Act of 1968, Pub. L. 90–284, 82 Stat. 73, the statute in this case deals only with racial discrimination and does not address itself to discrimination on grounds of religion or national origin.[6] It does not deal specifically with discrimination in the provision of services or facilities in connection with the sale or rental of a dwelling.[7] It does not prohibit advertising or other representations that indicate discriminatory preferences.[8] It does not refer explicitly

[1] To vindicate their rights under 42 U. S. C. § 1982, the petitioners invoked the jurisdiction of the District Court to award "damages or . . . equitable or other relief under any Act of Congress providing for the protection of civil rights . . . ." 28 U. S. C. § 1343 (4). In such cases, federal jurisdiction does not require that the amount in controversy exceed $10,000. Cf. *Douglas* v. *City of Jeannette*, 319 U. S. 157, 161; *Hague* v. *C. I. O.*, 307 U. S. 496, 507–514, 527–532.

[2] 255 F. Supp. 115.

[3] 379 F. 2d 33.

[4] 389 U. S. 968.

[5] Because we have concluded that the discrimination alleged in the petitioners' complaint violated a federal statute that Congress had the power to enact under the Thirteenth Amendment, we find it unnecessary to decide whether that discrimination also violated the Equal Protection Clause of the Fourteenth Amendment.

[6] Contrast the Civil Rights Act of 1968, § 804 (a).

[7] Contrast § 804 (b).

[8] Contrast §§ 804 (c), (d), (e).

to discrimination in financing arrangements[9] or in the provision of brokerage services.[10] It does not empower a federal administrative agency to assist aggrieved parties.[11] It makes no provision for intervention by the Attorney General.[12] And, although it can be enforced by injunction,[13] it contains no provision expressly authorizing a federal court to order the payment of damages.[14]

Thus, although § 1982 contains none of the exemptions that Congress included in the Civil Rights Act of 1968,[15] it would be a serious mistake to suppose that § 1982 in any way diminishes the significance of the law recently enacted by Congress. Indeed, the Senate Subcommittee on Housing and Urban Affairs was informed in hearings held after the Court of Appeals had rendered its decision in this case that § 1982 might well be "a presently valid federal statutory ban against discrimination by private persons in the sale or lease of real property."[16] The Subcommittee was told, however, that even if this Court should so construe § 1982, the existence of that statute would not "eliminate the need for congressional action" to spell out "responsibility on the part of the federal government to enforce the rights it protects."[17] The point was made that, in light of the many difficulties confronted by private litigants seeking to enforce such rights on their own, "legislation is needed to establish federal machinery for enforcement of the rights guaranteed under Section 1982 of Title 42 even if the plaintiffs in Jones v. Alfred H. Mayer Company should prevail in the United States Supreme Court."[18]

On April 10, 1968, Representative Kelly of New York focused the attention of the House upon the present case and its possible significance. She described the background of this litigation, recited the text of § 1982, and then added:

> "When the Attorney General was asked in court about the effect of the old law [§ 1982] as compared with the pending legislation which is being considered on the House floor today, he said that the scope was somewhat different, the remedies and procedures were different, and that the new law was still quite necessary."[19]

Later the same day, the House passed the Civil Rights Act of 1968. Its enactment had no effect upon § 1982[20] and no effect upon this litigation,[21] but it underscored the vast differences between, on the one hand, a general

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[9] Contrast § 805.

[10] Contrast § 806. In noting that 42 U. S. C. § 1982 differs from the Civil Rights Act of 1968 in not dealing explicitly and exhaustively with such matters (see also nn. 7 and 9, *supra*), we intimate no view upon the question whether ancillary services or facilities of this sort might in some situations constitute "property" as that term is employed in § 1982. Nor do we intimate any view upon the extent to which discrimination in the provision of such services might be barred by 42 U. S. C. § 1981, the text of which appears in n. 78, *infra*.

[11] Contrast the Civil Rights Act of 1968, §§ 808–811.

[12] Contrast § 814 (a).

[13] The petitioners in this case sought an order requiring the respondents to sell them a "Hyde Park" type of home on Lot No. 7147, or on "some other lot in [the] subdivision sufficient to accommodate the home selected . . . ." They requested that the respondents be enjoined from disposing of Lot No. 7147 while litigation was pending, and they asked for a permanent injunction against future discrimination by the respondents "in the sale of homes in the Paddock Woods subdivision." The fact that 42 U. S. C. § 1982 is couched in declaratory terms and provides no explicit method of enforcement does not, of course, prevent a federal court from fashioning an effective equitable remedy. See, *e. g.*, *Texas & N. O. R. Co.* v. *Ry. Clerks*, 281 U. S. 548, 568–570; *Deckert* v. *Independence Corp.*, 311 U. S. 282, 288; *United States* v. *Republic Steel Corp.*, 362 U. S. 482, 491–492; *J. I. Case Co.* v. *Borak*, 377 U. S. 426, 432–435. Cf. *Ex parte Young*, 209 U. S. 123; *Griffin* v. *School Board*, 377 U. S. 218.

[14] Contrast the Civil Rights Act of 1968, § 812 (c). The complaint in this case alleged that the petitioners had "suffered actual damages in the amount of $50.00," but no facts were stated to support or explain that allegation. Upon receiving the injunctive relief to which they are entitled, see n. 13, *supra*, the petitioners will presumably be able to purchase a home from the respondents at the price prevailing at the time of the wrongful refusal in 1965—substantially less, the petitioners concede, than the current market value of the property in question. Since it does not appear that the petitioners will then have suffered any uncompensated injury, we need not decide here whether, in some circumstances, a party aggrieved by a violation of § 1982 might properly assert an implied right to compensatory damages. Cf. *Texas & Pacific R. Co.* v. *Rigsby*, 241 U. S. 33, 39–40; *Steele* v. *Louisville & N. R. Co.*, 323 U. S. 192, 207; *Wyandotte Transportation Co.* v. *United States*, 389 U. S. 191, 202, 204. See generally *Bell* v. *Hood*, 327 U. S. 678, 684. See also 42 U. S. C. § 1988. In no event, on the facts alleged in the present complaint, would the petitioners be entitled to punitive damages. See *Philadelphia, Wilmington & Baltimore R. Co.* v. *Quigley*, 21 How. 202, 213–214. Cf. *Barry* v. *Edmunds*, 116 U. S. 550, 562–565; *Will* v. *Trans World Airlines, Inc.*, 200 F. Supp. 360, 367–368. We intimate no view, however, as to what damages might be awarded in a case of this sort arising in the future under the Civil Rights Act of 1968.

[15] See §§ 803 (b), 807.

[16] Hearings before the Subcommittee on Housing and Urban Affairs of the Senate Committee on Banking and Currency, 90th Cong., 1st Sess., 229. These hearings were a frequent point of reference in the debates preceding passage of the 1968 Civil Rights Act. See, *e. g.*, 114 Cong. Rec. S. 1387 (Feb. 16, 1968), S. 1453 (Feb. 1968), S. 1641 (Feb. 26, 1968), S. 1788 (Feb. 27, 1968).

[17] Hearings, *supra*, n. 16, at 229.

[18] *Id.*, at 230. See also *id.*, at 129, 162–163, 251. And see Hearings before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 90th Cong., 1st Sess., 416.

[19] 114 Cong. Rec. H. 2807 (April 10, 1968). See also id. at H. 2808. The Attorney General of the United States stated during the oral argument in this case that the Civil Rights Act then pending in Congress "would provide open housing rights on a complicated statutory scheme, including administrative, judicial, and other sanctions for its effectuation . . . ." "Its potential for effectiveness," he added, "is probably much greater than [§ 1982] because the sanctions and the remedies that it provides."

[20] At oral argument, the Attorney General expressed the view that if Congress should enact the pending bill, § 1982 would not be affected in any way but "would stand independently." That was, of course, correct. The Civil Rights Act of 1968 does not mention 42 U. S. C. § 1982, and we cannot assume that Congress intended to effect any change, either substantive or procedural, in the prior statute. See *United States* v. *Borden Co.*, 308 U. S. 188, 198–202. See also § 815 of the 1968 Act: "Nothing in this title shall be construed to invalidate or limit any law of . . . any . . . jurisdiction in which this title shall be effective, that grants, guarantees or protects the . . . rights . . . granted by this title . . . ."

[21] On April 22, 1968, we requested the views of the parties as to what effect, if any, the enactment of the Civil Rights Act of 1968

statute applicable only to racial discrimination in the rental and sale of property and enforceable only by private parties acting on their own initiative, and, on the other hand, a detailed housing law, applicable to a broad range of discriminatory practices and enforceable by a complete arsenal of federal authority. Having noted these differences, we turn to a consideration of § 1982 itself.

II.

This Court last had occasion to consider the scope of 42 U. S. C. § 1982 in 1948, in *Hurd* v. *Hodge,* 334 U. S. 24. That case arose when property owners in the District of Columbia sought to enforce racially restrictive covenants against the Negro purchasers of several homes on their block. A federal district court enforced the restrictive agreements by declaring void the deeds of the Negro purchasers. It enjoined further attempts to sell or lease them the properties in question and directed them to "remove themselves and all of their personal belongings" from the premises within 60 days. The Court of Appeals for the District of Columbia affirmed,[22] and this Court granted certiorari[23] to decide whether § 1982, then § 1978 of the Revised Statutes of 1874, barred enforcement of the racially restrictive agreements in that case.

The agreements in *Hurd* covered only two-thirds of the lots of a single city block, and preventing Negroes from buying or renting homes in that specific area would not have rendered them ineligible to do so elsewhere in the city. Thus, if § 1982 had been thought to do no more than grant Negro citizens the legal capacity to buy and rent property free of prohibitions that wholly disabled them because of their race, judicial enforcement of the restrictive covenants at issue would not have violated § 1982. But this Court took a broader view of the statute. Although the covenants could have been enforced without denying the general right of Negroes to purchase or lease real estate, the enforcement of those covenants would nonetheless have denied the Negro purchasers "the same right 'as is enjoyed by white citizens . . . to inherit, purchase, lease, sell, hold, and convey real and personal property.'" 334 U. S., at 34. That result, this Court concluded, was prohibited by § 1982. To suggest otherwise, the Court said, "is to reject the plain meaning of language." *Ibid.*

Hurd v. *Hodge, supra,* squarely held, therefore, that a Negro citizen who is denied the opportunity to purchase the home he wants "[s]olely because of [his] race and color," 334 U. S., at 34, has suffered the kind of injury that § 1982 was designed to prevent. Accord, *Buchanan* v. *Warley,* 245 U. S. 60, 79; *Harmon* v. *Tyler,* 273 U. S. 668; *Richmond* v. *Deans,* 281 U. S. 704. The basic source of the injury in *Hurd* was, of course, the action of private individuals—white citizens who had agreed to exclude Negroes from a residential area. But an arm of the Government—in that case, a federal court—had assisted in the enforcement of that agreement.[24] Thus *Hurd* v. *Hodge, supra,* did not present the question whether *purely* private discrimination, unaided by any action on the part of government, would violate § 1982 if its effect were to deny a citizen the right to rent or buy property solely because of his race or color.

The only federal court (other than the Court of Appeals in this case) that has ever squarely confronted that question held that a wholly private conspiracy among white citizens to prevent a Negro from leasing a farm violated § 1982. *United States* v. *Morris,* 125 F. 322. It is true that a dictum in *Hurd* said that § 1982 was directed only toward "governmental action," 334 U. S., at 31, but neither *Hurd* nor any other case before or since has presented that precise issue for adjudication in this Court.[25] Today we face that issue for the first time.

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had argued this litigation. The parties and the Attorney General, representing the United States as *amicus curiae,* have informed us that the respondents' housing development will not be covered by the 1968 Act until January 1, 1969; that, even then, the Act will have no application to cases where, as here, the alleged discrimination occurred prior to April 11, 1968, the date on which the Act became law; and that, if the Act were deemed applicable to such cases, the petitioners' claim under it would nonetheless be barred by the 180-day limitation period of §§ 810 (b) and 812 (a).

Nor did the passage of the 1968 Act after oral argument in this case furnish a basis for dismissing the writ of certiorari as improvidently granted. *Rice* v. *Sioux City Cemetery,* 349 U. S. 70, relied upon in dissent, *post,* at 29–30, was quite unlike this case, for the statute that belatedly came to the Court's attention in *Rice* reached precisely the same situations that would have been covered by a decision in this Court sustaining the petitioner's claim on the merits. The coverage of § 1982, however, is markedly different from that of the Civil Rights Act of 1968.

[22] 162 F. 2d 233.

[23] 332 U. S. 789.

[24] Compare *Harmon* v. *Tyler,* 273 U. S. 668, invalidating a New Orleans ordinance which gave legal force to private discrimination by forbidding any Negro to establish a home in a white community, or any white person to establish a home in a Negro community, "except on the written consent of a majority of the persons of the opposite race inhabiting such community or portion of the City to be affected." See *Shelley* v. *Kraemer,* 334 U. S. 1, 12.

[25] Two of this Court's early opinions contain dicta to the general effect that § 1982 is limited to state action. *Virginia* v. *Rives,* 100 U. S. 313, 317–318; *Civil Rights Cases,* 109 U. S. 3, 16–17. But all that *Virginia* v. *Rives, supra,* actually *held* was that § 641 of the Revised Statutes of 1874 (derived from § 3 of the Civil Rights Act of 1866 and currently embodied in 28 U. S. C. § 1443 (1)) did not authorize the removal of a state prosecution where the defendants, without pointing to any statute discriminating against Negroes, could only assert that a denial of their rights might take place and might go uncorrected at trial. 100 U. S., at 319–322. See *Georgia* v. *Rachel,* 384 U. S. 780, 797–804. And of course the *Civil Rights Cases, supra,* which invalidated §§ 1 and 2 of the Civil Rights Act of 1875, 18 Stat. 335, did not involve the present statute at all.

It is true that a dictum in *Hurd* v. *Hodge,* 334 U. S. 24, 31, characterized *Corrigan* v. *Buckley,* 271 U. S. 323, as having "held" that "[t]he action toward which the provisions of the statute . . . [are] directed is governmental action." 334 U. S., at 31. But no such statement appears in the *Corrigan* opinion, and a careful examination of *Corrigan* reveals that it cannot be read as authority for the proposition attributed to it in *Hurd.* In *Corrigan,* suits had been

> contracts and enforce contracts, I give notice that, if no one else does, I shall introduce a bill and urge its passage through Congress that will secure to those men every one of these rights: they would not be freemen without them. *It is idle to say that a man is free who cannot go and come at pleasure, who cannot buy and sell, who cannot enforce his rights.* . . . [So] when the constitutional amendment is adopted I trust we may pass a bill, if the action of the people in the southern States should make it necessary, that will be *much more sweeping and efficient than the bill under consideration.*" [48]

Five days later, on December 18, 1865, the Secretary of State officially certified the ratification of the Thirteenth Amendment. The next day Senator Trumbull again rose to speak. He had decided, he said, that the "more sweeping and efficient" bill of which he had spoken previously ought to be enacted

> ". . . at an early day for the purpose of quieting apprehensions in the minds of many friends of freedom lest by local legislation *or a prevailing public sentiment* in some of the States persons of the African race should continue to be oppressed and in fact deprived of their freedom . . . ." [49]

On January 5, 1866, Senator Trumbull introduced the bill he had in mind—the bill which later became the Civil Rights Act of 1866.[50] He described its objectives in terms that belie any attempt to read it narrowly:

> "Mr. President, I regard the bill to which the attention of the Senate is now called as the most important measure that has been under its consideration since the adoption of the constitutional amendment abolishing slavery. That amendment declared that all persons in the United States should be free. This measure is intended to give effect to that declaration and secure to all persons within the United States practical freedom. There is very little importance in the general declaration of abstract truths and principles unless they can be carried into effect, unless the persons who are to be affected by them have some means of availing themselves of their benefits." [51]

Of course, Senator Trumbull's bill would, as he pointed out, "destroy all [the] discriminations" embodied in the Black Codes,[52] but it would do more: It would affirmatively secure for all men, whatever their race or color, what the Senator called the "great fundamental rights":

> ". . . the right to acquire property, the right to go and come at pleasure, the right to enforce rights in the courts, to make contracts, and to inherit and dispose of property." [53]

As to those basic civil rights, the Senator said, the bill would "break down *all* discrimination between black men and white men." [54]

That the bill would indeed have so sweeping an effect was seen as its great virtue by its friends [55] and as its great danger by its enemies [56] but was disputed by none. Opponents of the bill charged that it would not only regulate state laws but would directly "determine the persons who [would] enjoy . . . property within the States," [57] threatening the ability of white citizens "to determine who [would] be members of [their] communit[ies] . . . ." [58] The bill's advocates did not deny the accuracy of those characterizations. Instead, they defended the propriety of employing federal authority to deal with "the white man . . . [who] would invoke the power of local preju-

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[48] Cong. Globe, 39th Cong., 1st Sess., 43. (Emphasis added.) The dissent seeks to neutralize the impact of this quotation by noting that, prior to making the above statement, the Senator had argued that the second clause of the Thirteenth Amendment was inserted "for the purpose, and none other, of preventing State Legislatures from enslaving, under any pretense, those whom the first clause declared should be free." See *post*, at 7, 14. In fact, Senator Trumbull was simply replying at that point to the contention of Senator Saulsbury of Delaware that the second clause of the Thirteenth Amendment was never intended to authorize federal legislation interfering with subjects other than slavery itself. See *id.*, at 42. Senator Trumbull responded that the clause was intended to authorize *precisely* such legislation. That, "and none other," he said for emphasis, was its avowed purpose. But Senator Trumbull did *not* imply that the force of § 2 of the Thirteenth Amendment would be spent once Congress had nullified discriminatory state laws. On the contrary, he emphasized the fact that it was "for Congress to determine, and nobody else," what sort of legislation might be "appropri-" ate" to make the Thirteenth Amendment effective. *Id.*, at 43. Cf. Part V of this opinion, *infra*.

[49] *Id.*, at 77. (Emphasis added.)

[50] *Id.*, at 129.

[51] *Id.*, at 474.

[52] *Ibid.* See the dissenting opinion, *post*, at 9.

[53] *Id.*, at 475.

[54] *Id.*, at 599. (Emphasis added.) Senator Trumbull later observed that his bill would add nothing to federal authority if the States would fully "perform their constitutional obligations." *Id.*, at 600. See also Senator Trumbull's remarks, *id.*, at 1758; the remarks of Senator Lane of Indiana, *id.*, at 602–603; and the remarks of Congressman Wilson of Iowa, *id.*, at 1117–1118. But it would be a serious mistake to infer from such statements any notion (see the dissenting opinion, *post*, at 11–12) that, so long as the States refrained from actively discriminating against Negroes, their "obligations" in this area, as Senator Trumbull and others understood them, would have been fulfilled. For the Senator's concern, it will be recalled (see text accompanying n. 49, *supra*), was that Negroes might be "oppressed and in fact deprived of their freedom" not only by hostile laws but also by "prevailing public sentiment," and he viewed his bill as necessary "unless by local legislation they [the States] provide for the real freedom of their former slaves." *Id.*, at 77. See also *id.*, at 43. And see the remarks of Congressman Lawrence of Ohio:

"Now, there are two ways in which a State may undertake to deprive citizens of these absolute, inherent, and inalienable rights: either by prohibitory laws, or by a failure to protect any one of them." *Id.*, at 1833.

[55] See, *e. g.*, the remarks of Senator Howard of Michigan. *Id.*, at 504.

[56] See, *e. g.*, the remarks of Senator Cowan of Pennsylvania, *id.*, at 500, and the remarks of Senator Hendricks of Indiana. *Id.*, at 601.

[57] Senator Saulsbury of Delaware. *Id.*, at 478.

[58] Senator Van Winkle of West Virginia. *Id.*, at 498.

lice" against the Negro.[59] Thus, when the Senate passed he Civil Rights Act on February 2, 1866,[60] it did so fully ware of the breadth of the measure it had approved.

In the House, as in the Senate, much was said about eliminating the infamous Black Codes.[61] But, like the Senate, the House was moved by a larger objective—hat of giving real content to the freedom guaranteed by he Thirteenth Amendment. Representative Thayer of Pennsylvania put it this way:

> "[W]hen I voted for the amendment to abolish slavery . . . I did not suppose that I was offering . . . a mere paper guarantee. And when I voted for the second section of the amendment, I felt . . . certain that I had . . . given to Congress ability to protect . . . the rights which the first section gave . . . .
>
> "The bill which now engages the attention of the House has for its object to carry out and guaranty the reality of that great measure. It is to give to it practical effect and force. It is to prevent that great measure from remaining a dead letter upon the constitutional page of this country. . . . The events of the last four years . . . have changed [a] large class of people . . . from a condition of slavery to that of freedom. *The practical question now to be decided is whether they shall be in fact freemen. It is whether they shall have the benefit of this great charter of liberty* given to them by the American people." [62]

Representative Cook of Illinois thought that, without appropriate federal legislation, any "combination of men in [a] neighborhood [could] prevent [a Negro] from having any chance" to enjoy those benefits.[63] To Congressman Cook and others like him, it seemed evident that, with respect to basic civil rights—including the "right to . . . purchase, lease, sell, hold, and convey . . . property," Congress must provide that "there . . . be *no* discrimination" on grounds of race or color.[64]

It thus appears that, when the House passed the Civil Rights Act on March 13, 1866,[65] it did so on the same assumption that had prevailed in the Senate: It too believed that it was approving a comprehensive statute forbidding *all* racial discrimination affecting the basic civil rights enumerated in the Act.

President Andrew Johnson vetoed the Act on March 27,[66] and in the brief congressional debate that followed, his supporters characterized its reach in all-embracing terms. One stressed the fact that § 1 would confer "the right . . . to purchase . . . real estate . . . without any qualification and without any restriction whatever . . . ." [67] Another predicted, as a corollary, that the Act would preclude preferential treatment for white persons in the rental of hotel rooms and in the sale of church pews.[68] Those observations elicited no reply. On April 6 the Senate, and on April 9 the House, overrode the President's veto by the requisite majorities,[69] and the Civil Rights Act of 1866 became law.[70]

In light of the concerns that led Congress to adopt it and the contents of the debates that preceded its passage, it is clear that the Act was designed to do just what its terms suggest: to prohibit all racial discrimination, whether or not under color of law, with respect to the rights enumerated therein—including the right to purchase or lease property.

Nor was the scope of the 1866 Act altered when it was re-enacted in 1870, some two years after the ratification of the Fourteenth Amendment.[71] It is quite true that some members of Congress supported the Fourteenth Amendment "in order to eliminate doubt as to the constitutional validity of the Civil Rights Act as applied to the States." *Hurd* v. *Hodge*, 334 U. S. 24, 32–33. But it certainly does not follow that the adoption of the Fourteenth Amendment or the subsequent readoption of the Civil Rights Act were meant somehow to *limit* its application to state action. The legislative history furnishes not the slightest factual basis for any such speculation, and the conditions prevailing in 1870 make it highly implausible. For by that time most, if not all, of the former Confederate States, then under the control of "reconstructed" legislatures, had formally

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[59] Senator Lane of Indiana. *Id.*, at 603.

[60] *Id.*, at 606–607.

[61] See, *e. g.*, *id.*, at 1118–1119, 1123–1125, 1151–1153, 1160. See generally the discussion in the dissenting opinion, *post*, at 16–18.

[62] *Id.*, at 1151. (Emphasis added.)

[63] *Id.*, at 1124.

[64] *Ibid.* (Emphasis added.) The clear import of these remarks is in no way diminished by the heated debate, see *id.*, at 1290–1294, portions of which are quoted in the dissenting opinion, *post*, at 18–19, between Representative Bingham, opposing the bill, and Representative Shellabarger, supporting it, over the question of what kinds of state laws might be invalidated by § 1, a question not involved in this case.

[65] *Id.*, at 1367. On March 15, the Senate concurred in the several technical amendments that had been made by the House. *Id.*, at 1413–1416.

[66] *Id.*, at 1679–1681.

[67] Senator Cowan of Pennsylvania. *Id.*, at 1781.

[68] Senator Davis of Kentucky. *Id.*, Appendix, at 183. Such expansive views of the Act's reach found frequent and unchallenged expression in the Nation's press. See, *e. g.*, Daily National Intelligencer (Washington, D. C.), March 24, 1866, p. 2, col. 1; New York Herald, March 29, 1866, p. 4, col. 3; Cincinnati Commercial, March 30, 1866, p. 4, col. 2; Evening Post (New York), April 7, 1866, p. 2, col. 1; Indianapolis Daily Herald, April 17, 1866, p. 2, col. 1.

[69] Cong. Globe, 39th Cong., 1st Sess., 1809, 1861.

[70] "Never before had Congress over-ridden a President on a major political issue, and there was special gratification in feeling that this had not been done to carry some matter of material interest, such as a tariff, but in the cause of disinterested justice." W. Brock, *supra*, n. 36, at 115.

[71] Section 18 of the Enforcement Act of 1870, Act of May 31, 1870, c. 114, § 18, 16 Stat. 140, 144:

"*And be it further enacted*, That the act to protect all persons in the United States in their civil rights, and furnish the means of their vindication, passed April nine, eighteen hundred and sixty-six, is hereby re-enacted . . . ."

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1966

No. 1837 Misc.

JULIUS W. HOBSON, individually and on behalf of JEAN MARIE HOBSON and JULIUS W. HOBSON, JR., et al.,

Plaintiffs-Appellants,

v.

CARL F. HANSEN, Superintendent of Schools of the District of Columbia, et al.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

The parties abovenamed, by their respective attorneys, hereby agree that the ~~jurisdictional~~ appeal statement previously filed by plaintiffs-appellants may be dismissed without costs to any party hereto and that the Clerk of this Court may enter an order so stating.

William A. Kunstler
Attorney for Plaintiffs-Appellants

Attorney for Defendants-Appellees.

June 7, 1968

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1967

No. ~~1837~~ 171 Misc.

JULIUS W. HOBSON, individually and on behalf of JEAN MARIE HOBSON and JULIUS W. HOBSON, JR., et al.,

Plaintiffs-Appellants,

v.

CARL F. HANSEN, Superintendent of Schools of the District of Columbia, et al.,

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The parties abovenamed, by their respective attorneys, hereby agree that the ~~jurisdictional statement~~ appeal previously filed by plaintiffs-appellants may be dismissed without costs to any party hereto and that the Clerk of this Court may enter an order so stating.

William A. Kunder
Attorney for Plaintiffs-Appellants

Attorney for Defendants-Appellees.

June 7, 1968

Friday June 13

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 171 Misc.

JULIUS W. HOBSON, INDIVIDUALLY AND ON BEHALF OF JEAN MARIE HOBSON AND JULIUS W. HOBSON, JR., ET AL., APPELLANTS

v.

CARL F. HANSEN, SUPERINTENDENT OF SCHOOLS OF THE DISTRICT OF COLUMBIA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION FOR EXTENSION OF TIME WITHIN WHICH TO FILE RESPONSE TO JURISDICTIONAL STATEMENT

Pursuant to Rules 34 and 50 of the Rules of this Court, the Solicitor General requests an extension of time to July 30, 1967, for responding to the jurisdictional statement filed by the appellants in this case. Unless extended, the time for responding will expire on June 30.

This thirty-day extension is necessary in order adequately to analyze and respond to the numerous questions presented in the jurisdictional statement. Such an extension would not delay the Court's consideration of the appeal, since our response would still be filed two months before the end of vacation. Counsel for appellants (William M. Kunstler, Esq.) informs us that they do not oppose this motion.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

JUNE 27, 1967.

Pursuant to Rules 34 and 50 of the Rules of this Court, the Solicitor General requests an extension of time to July 30, 1971, for responding to the jurisdictional statement filed by the appellants in this case. Unless extended, the time for responding will expire on June 30.

This thirty-day extension is necessary in order adequately to analyze and respond to the numerous questions presented in the jurisdictional statement. Such an extension would not delay the Court's consideration of the appeal, since our response would still be filed two months before the end of vacation. Counsel for appellants (William M. Kunstler, Esq.) informs us that they do not oppose this motion.

Respectfully submitted,

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. _____

JULIUS W. HOBSON, et al.,

Appellants,

v.

CARL F. HANSEN, et al.

CERTIFICATE OF SERVICE

I, Jerry D. Anker, one of the attorneys for appellants in this case and a member of the Bar of this Court, certify that I have served copies of appellants' Motion for Leave to Proceed In Forma Pauperis, Affidavit in support of that motion, and Jurisdictional Statement, by mailing them first class, postage prepaid, to the following:

Solicitor General of the United States
Department of Justice
Washington, D. C. 20530

David G. Bress, Esq.
United States Attorney
United States Courthouse
Washington, D. C. 20001

Charles T. Duncan, Esq.
Corporation Counsel
District of Columbia
District Building
Washington, D. C. 20004

Jerry D. Anker

Dated: May 31, 1967.

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. _____

JULIUS W. HOBSON, et al.,

Appellants,

v.

CARL F. HANSEN, et al.

AFFIDAVIT

I, Julius W. Hobson, being duly sworn, depose and say:

1. This is an affidavit in support of a motion for leave to proceed in forma pauperis in the Supreme Court of the United States in a proceeding in which I am one of the appellants. The proceeding is an appeal from a final judgment of a three-judge district court, convened pursuant to 28 U.S.C. §§ 2282, 2284, which refused to declare unconstitutional and enjoin the operation of District of Columbia Code § 31-101, which authorizes the District Judges of the United States District Court for the District of Columbia to appoint the members of the Board of Education of the District of Columbia.

2. A separate part of this same case is still pending before a single-judge district court. That part of the case involves a number of allegations of discrimination against Negro children and poor children by the Board of Education and the school administration of the District of Columbia. The trial of that part of the case took many weeks, and was very costly.

3. This entire litigation has been financed in part by contributions from those named plaintiffs who were financially

able to make such contributions, in part from contributions from other members of the class on whose behalf this action was brought, and in part from other citizens and organizations who voluntarily supported this case. The funds from these various sources, however, have now been totally depleted.

4. All of the appellants in this case are citizens of the United States and desire to prosecute this appeal in the United States Supreme Court.

5. Because of my extremely limited financial means, I am unable to pay the fees and costs of this appeal, or to give security therefor, and still be able to provide myself and my dependents with the necessities of life.

6. I know as a matter of my own knowledge that the other named appellants in this case are also unable, because of their extremely limited financial means, to pay the fees and costs of this appeal, or to give security therefor, and still be able to provide themselves and their dependents with the necessities of life.

7. I believe I and the other appellants are entitled to the relief sought and I am submitting this affidavit in good faith. A more detailed statement as to the grounds on which I and the other appellants believe we are entitled to relief will be set forth in the jurisdictional statement to be filed on our behalf.

_____

Julius W. Hobson

Subscribed and sworn to before

me this _____day of _____, 1967.

_____

Notary Public

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. _____

JULIUS W. HOBSON, et al.,

Appellants,

v.

CARL F. HANSEN, et al.

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Pursuant to Rule 53(1) of the Rules of this Court, appellants respectfully move for leave to proceed *in forma pauperis*. An affidavit in support of this motion is attached.

William M. Kunstler
511 Fifth Avenue
New York, New York 10017

Attorney for Appellants

NOTICE OF APPEAL TO THE
SUPREME COURT OF THE UNITED STATES

I. Notice is hereby given that plaintiffs in the herein action, individually and as representative of all others similarly situated, hereby appeal to the Supreme Court of the United States from the order of this Court of February 9, 1967, denying plaintiffs' motion for summary judgment and granting the motion of defendant United States District Judges for the District of Columbia to dismiss Count 1 of the complaint herein.

This appeal is taken pursuant to 28 U.S.C. 1253.

II. The Clerk will please prepare a transcript of the record in this cause for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

(a) The complaint.

(b) Plaintiffs' motion for summary judgment.

(c) Motion of the United States District Court Judges for the District of Columbia to Dismiss the Complaint, and their opposition to plaintiffs' motion for summary judgment.

(d) Opposition of defendants except the Judges of the United States District Court for the District of Columbia to plaintiffs' motion for summary judgment.

(e) The answers of defendants.

(f) Opinion of Judge Wright dated March 25, 1966.

(g) Designation of Judges to Serve on Three-Judge Court, dated March 29, 1966.

ORDER

It is ORDERED that the motion of plaintiff in the above-entitled cause, heretofore submitted on the motion of defendants for summary judgment, be and the same hereby is granted.

It is FURTHER ORDERED that the motion of plaintiff for summary judgment be and the same hereby is denied.

It is FURTHER ORDERED that the Clerk of the District Court of the United States, and thereby is duly directed to enter judgment in favor of defendants and against plaintiff.

Dated: January 24, 1964.

BY THE COURT:

/s/ [illegible]

III. The following question is presented by this

violative of the Constitution of the United States and, in

IN THE SUPREME COURT OF THE UNITED STATES

October Term]966

No. _____

Julius W. Hobson, Patricia S. Rosemond,
Grover C.Dye, and William Higgs,

Petitioners

v.

The Honorable Oliver Gasch, District
Judge of the United States District
Court for the District of Columbia,

Respondent

Petition for Writ of Certiorari to the
United States Court of Appeals for the
District of Columbia Circuit

Julius W. Hobson
Patricia S. Rosemond
Grover C. Dye
William Higgs

]2]0th St. NE
Washington, D.C.

Pro se

INDEX

PETITION FOR A WRIT OF CERTIORARI

Petioners, Julius W. Hobson, Patricia S. Rosemond, Grover C. Dye and William Higgs, on behalf of themselves and other citizens of the District of Columbia similarly situated, pray that a writ of certiorari issue to review the order of the Court of Appeals for the District of Columbia Circuit denying Petitioners' application for a writ of mandamus directing Respondent to certify the necessity for convening a statutory three-judge court to hear and determine Petitioners' Complaint.

Citations to Opinions Below

The order of the Court of Appeals denying Petitioners' application for a writ of mandamus, without opinion, is not yet reported (D.C. Cir., No. 20,388, Sept. Term,]966; Appendix A). The opinion of the District Court refusing to certify the necessity for convening a statutory three-judge court is reported at 255 Fed. Supp. 295 (1966).

Jurisdiction

The order of the Court of Appeals was entered on September 29, 1966. No application for enlargement of time to file this petition has been made.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C.]254 ()).

Questions Presented

1. Is a substantial Constitutional question presented by a claim that Acts of Congress totally withdrawing local self-government from citizens of the District of Columbia are inconsistent with the Ninth, Tenth, and Fifth Amendments to the Constitution and are thus an impermissible exercise of Congress' power of exclusive legislation over the District?

2. Is a substantial Constitutional question presented by a claim stating that Acts of Congress abolishing local self-government were passed for the purpose and with the effect of denying Negro citizens of the District of Columbia the right to vote on account of their race and that such Acts therefore violate the Fifteenth Amendment to the Constitution?

Constitutional Provisions and Statutes Involved

Constitution of the United States:

Article I, Section 8, Clause 17

The Congress shall have Power...

> To exercise exclusive Legislation in all Cases whatsoever, over such District, (not exceeding ten miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the erection of Forts, Magazines, and Arsenals, dock-Yards, and other needful Buildings; --And ....

Amendment V

> No person shall... be deprived of life, liberty, or property, without due process of law;....

Amendment IX

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Amendment X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Amendment XV

Section]. The right of citizens of the United States to vote shall not be denied or abridge by the United States or by any State on account or race, color, or previous condition of servitude.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

District of Columbia Code:

Section]-20]. Appointment of Commissioners.

The President of the United States, by and with the advice and consent of the Senate, is hereby authorized to appoint two persons, who, with an officer of the Corps of Engineers of the United States Army, shall be Commissioners of the District of Columbia. Vol.]. D.C. Code, p.8.

Section]-202. Engineer Commissioner may be designated from rank of captain or above.

Such engineer commissioner may, in the discretion of the President of the United States, be detailed from among the captains or officers of higher grade having served at least fifteen years in the Corps of Engineers of the Army of the United States. Vol.]. D.C. Code, p.9

Statement of the Case

Your four petitioners, all citizens of the District of Columbia -- two Negro, two white, filed a complaint (Exhibit A to Appendix B) on behalf of themselves and others similarly situated in the U.S. District Court of the District of Columbia on April 25,]966, setting forth essentially two claims: (]) the Acts of Congress dating from 1871 abolishing or withholding local self-government to the citizens of the District are not valid exercises of Congress' power of exclusive legislation over the District, since these Acts violate the Ninth, Tenth, and Fifth Amendments; and (2) beginning in 1871 and continuing until the present, Congress first abolished and then has withheld local self-government because the large and burgeoning Negro population of the District would give that population a major or controlling voice in the District's local governmental affairs, all contrary to the prohibition of the Fifteenth Amendment.

The District Court on May 4, 1966, in an opinion by Respondent (Exhibit B to Appendix B) refused to certify the necessity for the convening of a three-judge statutory court and found that Petitioners' claims were insubstantial. Petitioners had no opportunity to present either briefs or oral argument to the Court prior to its handing down the]2-page opinion nine days after the filing of the complaint.

On August 9, 1966, Petitioners applied to the United States Court of Appeals for the District of Columbia Circuit for a writ of mandamus requiring Respondent to certify affirmatively as to the need for a three-judge court (Appendix B). On September 29, 1966, the Court of Appeals, acting in

chambers and with one judge not participating, but upon consideration of briefs from both opposing sides, denied Petitioners' petition for the writ of mandamus (Appendix A). It is of this order of the Court of Appeals that Petitioners request review in this Court by writ of certiorari.

Reasons for Granting the Writ

Petitioners respectfully suggest that there are four reasons of moment for granting the writ.

First, no legal circumlocution can obscure the fact that the consequences of an ultimate favorable ruling for Petitioners would mean self-government for the citizens of the nation's capital city and the opening of the way for the solution of problems of the District's nearly one million citizens -- problems that are growing increasingly acute. Where such consequences are in the balance, Petitioners ernestly believ e that they -- and any others as amici curiae -- should be entitled to a full and considered hearing as which adequate time is accorded for an in-depth exploration of all issues, particularly the extensive questions of Constitutional and legislative history.

Secondly, the decisions of this Court, especially at the last two terms, raise serious doubts as to the correctness of the decisions of the District Court and of the Court of Appeals as a matter of federal Constitutional law.

This Court has recently had occasion to emphasize the keystone role of suffrage. Mr. Justice Black summarized the Court's views on the right to vote in Wesberry v. Sanders, 376 U.S.],]7,]8 (]964):

> No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined. Our Constitution leaves no room for classification of people in a way that unnecessarily abridges this right. (emphasis added)

In Reynolds v. Sims, 377 U.S. 533 (1964), the Chief Justice wrote at p. 562:

> Almost a century ago, in Yick Wo v. Hopkins, 118 U.S. 363, the Court referred to "the political franchise of voting" as "a fundamental political right, because preservative of all rights." 118 U.S., at 370. ....
>
> It could hardly be gainsaid that a constitutional claim had been asserted by an allegation that certain otherwise qualified voters had been entirely prohibited from voting for members of their state legislature.

In Griswold v. Connecticut,381 U.S. 479 (1965) Mr. Justice Goldberg in his concurring opinion joined in by the Chief Justice and Mr. Justice Brennan, pointed out that the Ninth Amendment "simply shows the intent of the Constitution's authors that other fundamental personal rights should not be denied such protection or disparaged in any other way simply because they are not specifically listed in the first eight constitutional amendments" (at p. 492).

The wealth of possibly relevant historical materials on the question of the nature of the Ninth and Tenth Amendments' protection of the rights of self-government and suffrage as against enc roachment by the national government becomes apparent with study; however, two examples of gleanings from these materials seem particularly appropriate here. (1)The Maryland Declaration of Rights, (1776) which applied to the land now comprising most of the District of Columbia, and which existed at the time of the Ninth Amendment's adoption, stated

> That the right in the people to participate in the legislature is the best security of liberty, and the foundation of all freegovernment; for this purpose elections ought to be free and frequent, and every man having property in, a common interest with, and an attachment to the community, ought to have a right of suffrage.(Thorpe, American Charters, Constitutions and Organic Laws, Vol. 3, p. 1687, (1909)).

(2) James Madison, who introduced what became the Ninth Amendment, justified it on the ground that "It has been objected also against a bill of rights, that, by enumerating particular exceptions to the grant of power, it would disparage those rights which were not placed in that enumeration.... but, I conceive, that it may be guarded against, I have attemted it [in the Ninth Amendment] " (I Annals of Congress 456 (June 8, 1789).). In Madison's original version, the Amendment read

> The exceptions here or elsewhere in the Constitution, made in favor of particular rights, shall not be so construed as to diminish the just importance of other rights retained by the people, or as to enlarge the powers delegated by the Constitution; but either as actual limitations of such powers, or as inserted merely for greater caution..." (I Annals of Congress 452)(June 8, 1789).

Thirdly, Petitioners are not aware of any previous case in which this Court has had squarely presented the question of the scope of the Ninth, Tenth, and Fifth Amendments in protecting as against the federal government the twin rights of self-government and suffrage whether or not considered in the context of the District of Columbia Clause of the Constitution. Of course, in Bolling v. Sharpe, 347 U.S. 497 (1954), this Court considered the District of Columbia Clause to be no barrier to the Fifth Amendment's protection of equal educational opportunity as against action by the national government.

Finally, Petitioners believe that the nature of the Application of the Fifteenth Amendment ~~to~~ the United States is flatly an open question. Though the District Court (Exhibit B to Appendix B at pp. 8-10) first -- and not unreasonably -- assumed that the rich gloss given by this Court to the Fifteenth Amendment as applied to the States would be no different when the United States were under consideration, that Court then, Petitioners most respectfully submit, proceeded to give a totally unwarranted and just plain wrong interpretation to this Court's Fifteenth Amendment decsions.

The District Court states:

> It is clear by a reading of the Fifteenth Amendment that the words "on account of" denote a factor of causation, namely, that a person of one race is denied the right to vote whereas a person of another race, similarly situated, enjoys the right to vote... In view of the Supreme Court's interpretation of the Fifteenth AMendment, it is clear that the evil which was intended to be remedied by such AMendment was racial discrimination in voting. Turning to the challenged sections of the District of Columbia Code, no citizen of the District of Columbia possesses the right to vote insofar as the local government is concerned. By choosing to live within the District of Columbia, all citizens, regardless of race, relinquish the right to vote in local elections. As provided in the Twenty-third Amendment, their influence on the form of government which exercises jurisdiction over them is limited to the right to vote for the President.
> Therefore, since the Negro plaintiffs in the instant case have made no allegation of racial discrimination, the Fifteenth Amendment is not applicable and the Court declines to convene a three-judge court to examine the constitutionality of §§ 1-201 and 1-202 of the District of Columbia Code in light of that Amendment.(Exhibit B to Appendix B. (At pp. 8-10)).

With deference, Petitioners further suggest that the District Court has transferred Equal Protection Clause notions into the otherwise explicit language of the Fifteenth Amendment and that this is both an erroneous and unfortunate occurrence. One might gather from the District Court's reasoning that the Alabama Legislature in Gomillion v. Lightfoot (364 U.S. 339 (1960)) could, without fear of the Fifteenth Amendment, have proceeded to abolish local self-government in Tuskegee by denying the franchise to all citizens white as well as black, while simultaneously establishing a municipal government appointed by Governor Wallace, all done for demonstrably racial reasons.

Conclusion

For the reasons stated above, Petitioners respectfully suggest that a writ of certiorari would most properly issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

Julius W. Hobson

Patricia S. Rosemond

Grover C. Dye

William Higgs

Petitioners, pro se

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,388 September Term, 1966

Julius W. Hobson, et al., Civil Action 1071-66

Petitioners,

v.

The Honorable Oliver Gasch,
District Judge of the United States
District Court for the District of
Columbia,

Respondent.

United States Court
of Appeals for the
District of Columbia
Circuit
FILED SEP 29 1966

Nathan J. Paulson/s/
Clerk

Before: McGowan, Tamm, and Leventhal, Circuit Judges, in Chambers.

ORDER

On consideration of petitioners' petition for writ of mandamus and of respondent's opposition thereto, it is

ORDERED by the court that petitioners; aforesaid petition is denied.

Per Curiam

Circuit Judge Leventhal did not participate in the foregoing order.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 82–66

Julius W. Hobson, individually and on behalf of Jean Marie Hobson and Julius W. Hobson, Jr.; all residing at 4801 Queens Chapel Terrace N.E. D.C.; Samuel D. Graham, individually and on behalf of Barbara Jeane Graham and Karen Chandelle Graham; all residing at 1827 Massachusetts Ave. S.E. D.C.; Mary Alice Brown, individually and on behalf of Charles Hudson Brown; both residing at 2412 20th St. D.C.; Pauline Smith, individually and on behalf of Maurice Hood; both residing at 1017 4th St. S.E. D.C.; Willie Davis, Jr., individually and on behalf of Ronald D. Davis, Reginald D. Davis and Myoshi J. Davis; all residing at 3931 14 St. N.W. D.C.; James K. Ward, individually and on behalf of Chrycynthia Elain Ward; both residing at 1100 Trenton Pl. S.E. D.C.; Joyce M. Makel, individually and on behalf of Michelle I. Makel; and Carolyn Hill Stewart, residing at 1303 Congress St. S.E. D.C., Plaintiffs,

v.

Carl F. Hansen, Superintendent of Schools of the District of Columbia; the Board of Education of the District of Columbia; Wesley S. Williams, President of the Board of Education of the District of Columbia; Carl Smuck, Everett A. Hewlett, West A. Hamilton, Louise S. Steele, Euphemia L. Haynes, Gloria K. Roberts, Preston A. McLendon, and Irving B. Yochelson, members of the Board of Education of the District of Columbia; Chief Judge Matthew F. McGuire; Senior Judges Joseph L. Jackson, Henry A. Schweinhaut, Charles S. McLaughlin, and David A. Pine; and District Judges Alexander Holtzoff, Richmond B. Keech, Edward M. Curran, Burnita Shelton Matthews, Luther W. Youngdahl, Joseph C. McGarraghy, John J. Sirica, George L. Hart, Jr. Leonard P. Walsh, William B. Jones, Spottswood W. Robinson, III, Howard S. Corcoran, Oliver Gasch, William B. Bryant, all of the United States District Court for the District of Columbia; The Board of Elections of the District of Columbia; Charles H. Mayer, (Chairman), Ernest Schein, and Dr. Robert Earl Martin, members of the Board of Elections of the District of Columbia, Defendants.

Complaint for Declaratory Judgment and Injunction

COMPLAINT

The plaintiffs, for their verified complaint, allege:

Parties

1. *Plaintiffs:*

(a) The infant plaintiffs, Julius W. Hobson, Jr., (McKinley High School); Barbara Jeane Graham, (Eastern High School); Karen Chandelle Graham, (Hines Jr. High School); Charles Hudson Brown, (Langdon Elementary School); Maurice Hood, (Randall Jr. High School); Ronald D. Davis, (Crosby Noyes Elementary School); Reginald D. Davis, (Crosby Noyes Elementary School); Myoshi J. Davis, (Crosby Noyes Elementary School); Chrycynthia Elain Ward, (Congress Heights Elementary School), and Mitchell I. Makel, (Crosby Noyes Elementary School) are among those generally classified as Negroes; are citizens of the United States and of the District of Columbia. They are within the statutory age limits of eligibility to attend the public schools of the District of Columbia. They satisfy all of the requirements for admission to such schools and are, in fact, attending public schools under the supervision, operation and control of the defendants. These plaintiffs comprise two general categories, viz., those who are eligible to attend and are attending public elementary schools and those who are eligible to attend and are attending public secondary schools in the District of Columbia, both types of schools being under the direct supervision, operation and control of the defendants. Some plaintiffs have been placed and are presently placed in the "basic" and "general" tracks of the so-called "track system" presently in operation in the public schools of the

District of Columbia, as more fully explained in the paragraph of this complaint numbered and designated "13."

(b) Adult plaintiffs, Julius W. Hobson, Samuel D. Graham, Mary Alice Brown, Pauline Smith, Willie Davis, Jr., James K. Ward, and Joyce M. Makel are among those classified as Negroes; are citizens of the United States and of the District of Columbia and are residents of and domiciled in the District of Columbia. They are taxpayers of the District of Columbia and of the United States. They are guardians and parents of the infant plaintiffs referred to in the paragraph above and designated in the caption of this action, and are required by the laws of the District of Columbia to send the children under their charge and control to public or private schools. In addition, plaintiff Julius W. Hobson has been compelled, for some or all of the reasons hereinafter set forth, to remove his infant daughter, Jean Marie Hobson, from the Amidon Elementary School, a public school under the supervision and control of the defendants, and enroll her, at great cost and inconvenience, in a private school.

(c) Plaintiff Carolyn Hill Stewart is among those classified as Negroes; is a citizen of the United States and of the District of Columbia and is a resident of and domiciled in the District of Columbia. She is a permanent teacher in the public school system of the District of Columbia and is required by the terms of her employment to obey, adhere, and conform to defendants' rules, regulations, policies, directives, customs, practices, and usages.

2. Plaintiffs bring this action in their own behalf and in behalf of all other Negro children attending the public schools in the District of Columbia, their parents and guardians, and teachers employed by the defendant's similarly situated and affected with reference to the matters here involved. They are so numerous as to make it impracticable to bring them all before the Court. There being common questions of law and fact, a common relief being sought, as will hereinafter more fully appear, plaintiffs present this action as a class action pursuant to Rule 23(a) of the Federal Rules of Civil Procedure.

3. *Defendants:*

(a) Defendant Board of Education exists pursuant to the laws of the United States governing the District of Columbia. (Code of the District of Columbia, § 31–101) Defendant Wesley S. Williams, (Negro) is President of the said Board of Education; defendants Carl Smuck (white), Everett A. Hewlett (Negro), West A. Hamilton (Negro), Louise S. Steele (white), Euphemia L. Haynes (Negro), Gloria K. Roberts (white), Preston A. McLendon (white), and Irving B. Yochelson (white), are members of the said Board of Education and all are being sued in their official capacities.

(b) Defendant, Carl F. Hansen, is the Superintendent of Schools of the District of Columbia (hereinafter referred to as the Superintendent of Schools). He is the executive officer of the Board of Education, charged with the responsibility of maintaining, managing and governing the public schools in the aforesaid District, in accordance with the rules, regulations, policies, directives, customs, practices and usages established by defendant Board of Education. He is being sued in his official capacity.

(c) The defendant, Hon. Matthew F. McGuire, is the Chief Judge of the United States District Court for the District of Columbia; the defendants Hons. Joseph L. Jackson, Henry A. Schweinhaut, Charles S. McLaughlin and David A. Pine, are Senior Judges of the United States District Court for the District of Columbia; defendants, the Hons. Alexander Holtzoff, Richmond B. Keech, Edward M. Curran, Burnita Shelton Matthews, Luther W. Youngdahl, Joseph C. McGarraghy, John J. Sirica, George L. Hart, Jr., Leonard P. Walsh, William B. Jones, Spottswood W. Robinson III, Howard S. Corcoran, Oliver Gasch, and William B. Bryant are District Judges of the United States District Court for the District of Columbia. All are being sued in their official capacities.

(Any reference to defendants hereinafter contained in this complaint shall not pertain to any of the United States District Court judges heretofore mentioned unless they are specifically mentioned by name or designation.)

(d) Defendants, Charles H. Mayer, (Chairman), Ernest Schein and Dr. Robert Earl Martin, are members of the Board of Elections of the District of Columbia and are sued in their official capacities. Said Board of Elections has the responsibility for scheduling, holding and/or conducting all elections within the District of Columbia. (Any reference to defendants hereinafter contained

in this complaint shall not pertain to any of the members of the Board of Elections of the District of Columbia heretofore mentioned unless they are specifically mentioned by name or designation.)

JURISDICTION

4. (a) The jurisdiction of this Court is invoked under Title 28 U.S.C., § 1331. This action arises under the Fifth Amendment to the Constitution of the United States, and Article II, § 2, Clause 2 of the Constitution of the United States. The matter in controversy exceeds, exclusive of interest and costs, the sum or value of Ten Thousand ($10,000.00) Dollars.

(b) The jurisdiction of this Court is also invoked under Title 28 U.S.C. § 1343. This action is authorized by Title 42 U.S.C., §§ 1981 et seq., §§ 2000(c) et seq., and § 2000(d) et seq; and the Elementary and Secondary Education Act of 1965.

(c) The jurisdiction of this Court is further invoked under Title 28 U.S.C., § 2282. This is an action for a permanent injunction restraining, *inter alia*, the enforcement, operation and execution of § 31–101 of the District of Columbia Code and of the rules, regulations, policies, directives, customs, practices and usages of the Board of Education of the District of Columbia as more fully set forth below.

5. This is a proceeding for declaratory judgment under Title 28 U.S.C., § 2201 for the purpose of determining questions of actual controversies between the parties, to wit:

(a) The question of whether § 31–101 of the District of Columbia Code which directs the District Judges of the United States District Court for the District of Columbia to appoint the members of the Board of Education of the District of Columbia (hereinafter referred to as the Board of Education) violates Article II, § 2, Clause 2 of the Constitution of the United States in that it purports to and does in fact delegate unconstitutional powers to the District Judges of the United States District Court for the District of Columbia.

(b) The question of whether the rules, regulations, policies, directives, customs, practices and usages of the defendants and each of them, in denying, on account of race and color, the infant plaintiffs and other Negro children of public school age residing in the District of Columbia, educational opportunities, advantages and facilities in the public elementary and secondary schools of said District, including those hereinabove specified, equal to the educational opportunities, advantages and facilities afforded and available to white children of public school age similarly situated in the District of Columbia, are unconstitutional and void, as depriving said plaintiffs of due process and the equal protection of the law in contravention of the Fifth Amendment to the Constitution of the United States.

(c) The question of whether the rules, regulations, policies, directives, customs, practices and usages of the defendants, and each of them in denying on account of race and color the adult plaintiffs, with the exception of plaintiff Carolyn Hill Stewart, and other parents and guardians of Negro children of public school age similarly situated residing in the District of Columbia, rights and privileges of sending their children to public schools in said District with educational opportunities, advantages and facilities, including those hereinafter specified, equal to the educational opportunities, advantages and facilities afforded and available to white children of public school age in the District of Columbia, are unconstitutional and void as depriving said plaintiffs of due process and the equal protection of the law in contravention of the Fifth Amendment to the Constitution of the United States.

(d) The question of whether the enforced participation of plaintiff Carolyn Hill Stewart and other Negro teachers employed by the Board of Education of the District of Columbia in the implementation of rules, regulations, policies, directives, customs, practices and usages of defendants and each of them, which deny, on account of race and color, to the infant plaintiffs and other Negro children residing in said District educational opportunities, advantages and facilities in the public elementary and secondary schools of said District, including those hereinabove specified, equal to the educational opportunities, advantages and facilities afforded and available to white children of public school age similarly situated, deprives said plaintiffs of due process and the

equal protection of the law, in contravention of the Fifth Amendment to the Constitution of the United States.

(e) The question of whether the rules, regulations, policies, directives, customs, practices and usages of the defendants and each of them in intentionally denying, on account of race and color, the infant plaintiffs and other Negro children of public school age residing in the District of Columbia educational opportunities, advantages and facilities in the public elementary and secondary schools of said District, including those hereinabove specified, equal to the educational opportunities, advantages and facilities afforded and available to white children of public school age similarly situated in adjoining, adjacent and contiguous areas of Maryland and Virginia are unconstitutional and void as depriving said plaintiffs of due process and the equal protection of the law, in contravention of the Fifth Amendment to the Constitution of the United States.

(f) The question of whether the rules, regulations, policies, directives, customs, practices and usages of the defendants and each of them in intentionally denying, on account of race and color, the adult plaintiffs, with the exception of Carolyn Hill Stewart, and other parents and guardians of Negro children of public school age similarly situated residing in the District of Columbia, rights and privileges of sending their children to public schools in their District with educational opportunities, advantages and facilities, including those hereinafter specified, equal to the educational opportunities, advantages and facilities offered and available to white children of public school age in adjoining, adjacent and contiguous areas of Maryland and Virginia, are unconstitutional and void as depriving said plaintiffs of due process and the equal protection of the law in contravention of the Fifth Amendment to the Constitution of the United States.

CAUSES OF ACTION

First cause of action

6. Pursuant to § 31-101 of the District of Columbia Code, the District Judges of the United States District Court for the District of Columbia are directed and empowered to nominate and appoint nine (9) members of the defendant Board of Education, as follows: three members thereof to be nominated and appointed per annum for terms of three (3) years.

7. Said defendant Board of Education consists exclusively of non-judicial officers with solely executive responsibilities wholly unrelated to the functions and responsibilities of the United States District Court for the District of Columbia.

8. The vesting of the power of nomination and appointment of non-judicial officers with executive responsibilities wholly unrelated to the functions and responsibilities of the United States District Court for the District of Columbia is prohibited by Article II, § 2, Clause 2 of the Constitution of the United States.

9. Said defendant Board and the members thereof have, therefore, been unconstitutionally nominated and appointed and are now unconstitutionally functioning and operating as the Board of Education of the District of Columbia.

10. Defendant Hansen having been nominated and appointed by defendant Board of Education and the members thereof has been and is now unconstitutionally functioning and operating as the Superintendent of Schools.

Second cause of action

11. The establishment, maintenance and administration of public schools in the District of Columbia are vested in the Board and the Superintendent of Education of the District of Columbia.

12. The public schools of the District of Columbia are under the direct control and supervision of defendants who are under a duty to maintain an efficient system of public schools in said District, wholly consistent with the requirements of the Constitution of the United States. Said District has a public school population that is almost ninty percent Negro and ten percent white, and a total population that is sixty-one percent Negro and thirty-nine percent white.

13. The defendants, and each of them, have at all times operated and, unless restrained as a result of this action, will continue to operate the public school system of the District of Columbia in such a manner as to discriminate against the infant plaintiff solely because of their race and/or color, all in violation of the Fifth Amendment to the Constitution of the United States. Among other things, defendants:

(a) have originated and continue to administer since the decision of the United States Supreme Court in *Bolling* v. *Sharpe*, 347 U.S. 497 (1954), in the public schools under their supervision, a rigid system of pupil ability grouping, referred to hereinafter as the "track system". This system consists of at least four (4) tracks—basic, general, regular and honors—and the placement of a public school student in any one thereof is normally decisive during the balance of his or her public school attendance. The intent and/or effect of the application of said "track system" has been the separation, segregation and exclusion of the infant plaintiffs and their classes, as well as the denial thereto of an education equal to that offered all qualified students who are not of Negro descent.

Moreover, the further intent and/or effect of defendants' application of the "track system" is to deprive the infant plaintiffs and their classes of further educational opportunity by the discriminatory utilization of the non-college preparatory "general" and "basic" tracks insofar as Negro pupils are concerned. At the same time, the college preparatory "regular" and "honor" tracks are discriminatorily utilized by the defendants to allow students who are not of Negro descent to qualify for college and to separate them from the bulk of students of Negro descent.

Moreover, the further intent and/or effect of the "track system" is to discourage and prevent the infant plaintiffs and their classes from even completing their secondary education.

(b) have pursued and continue to pursue educational policies and practices based upon race and color that foster and encourage the juvenile delinquency of the infant plaintiffs and their classes.

(c) have provided and continue to provide for those schools under their supervision with predominantly white pupil populations plant, equipment, materials, supplies and curricula discriminatorily superior to those provided for schools with predominantly Negro pupil populations, thereby depriving the infant plaintiffs and their classes, solely because of race and color, the opportunity of attending public schools where they can obtain an education equal to that offered to all qualified students who are not of Negro descent.

(d) have utilized and continue to utilize public revenues under their control to match or equal private funds raised in predominantly white residential areas of the District for the purpose of improving the plant, equipment, materials, supplies and curricula in the public schools of said areas, thereby discriminating against public schools attended by the infant plaintiffs and their classes.

(e) have accepted and continue to accept private funds for use in the improvement of plant, equipment, material, supplies and curricula in designated public schools with predominantly white pupil populations, thereby depriving the infant plaintiffs and their classes, solely because of race and color, the opportunity of attending public schools where they can obtain an education equal to that offered to all qualified students who are not of Negro descent.

(f) have stationed and continue to station police and other law enforcement officials conspicuously in and about schools attended by the infant plaintiffs and their classes, thereby causing the intimidation and degradation of said Negro students solely because of their race and color.

(g) have dismissed from and/or refused to appoint and continue to dismiss and/or refuse to appoint to high administrative and policymaking positions in the District school system qualified Negroes solely on account of their race and color.

(h) have failed, neglected and refused and continue to fail, neglect and refuse to promote plaintiff Carolyn Hill Stewart and other Negro teachers similarly situated to positions for which they are highly qualified, solely because of their race and color.

(i) have failed to utilize and continue to fail to utilize funds provided by the Elementary and Secondary Education Act of 1965 to further the education of those infant plaintiffs and their classes who are members of families earning Three Thousand ($3.000) Dollars or less per annum, and have, instead, discriminated and continue to discriminate in the distribution of said funds in favor of the those schools under their supervision with predominantly white pupil populations.

(j) have allocated and assigned and continue to allocate and assign less experienced and/or "temporary" teachers to those schools attended by the infant plaintiffs and their classes, while at the same time they have allocated and assigned and continue to allocate and assign more experienced and "permanent" teachers to those schools with predominantly white pupil populations.

(k) have drawn and continue to draw the geographical lines or limits of the various sections of the District of Columbia under their jurisdiction so as to separate, segregate and exclude the infant plaintiffs and their classes from those schools with heretofore predominantly white school populations so as to maintain the racial composition thereof.

(l) have ignored and violated and continue to ignore and violate the mandate of the Supreme Court of the United States in *Bolling* v. *Sharpe*, *supra*, in which the Court held that "racial segregation in the public schools of the District of Columbia is a denial of the due process of law guaranteed by the Fifth Amendment to the Constitution" (at 500).

Third cause of action

14. Defendants have failed, refused and neglected and continue to fail, refuse and neglect to demand adequate funds from the agencies of the District of Columbia and the Congress of the United States with which to operate the public school system under their control. Such refusal, neglect and failure, together with defendants' improper actions as hereinbefore alleged have directly resulted in the decline of the quality of the plant, equipment, materials, supplies and curricula of the public school system of the District of Columbia, thereby purposely and willfully creating racial discrimination and segregation in the public schools of the District of Columbia in relation and diametric contrast to those in adjoining, adjacent and contiguous sections of Virginia and Maryland. As a result, the infant plaintiffs and their classes have suffered and are continuing to suffer from said failure, neglect and refusal of defendants to demand adequate funds for the operation of the District school system, and their other improper actions as hereinbefore alleged, all in violation of the Due Process Clause of the Fifth Amendment to the Constitution of the United States.

Fourth, fifth, and sixth causes of action

15. All of the allegations hereinbefore set forth based on race and/or color are hereby repeated and realleged based upon economic deprivation and poverty with the same force and effect as if more fully and completely here set forth.

16. Plaintiffs and others similarly situated are suffering irreparable injury and are threatened by irreparable injury in the future by reason of the acts herein complained of. They have no plain, adequate or complete remedy to redress the wrongs and illegal acts herein complained of other than this suit for declaration of rights and an injunction. Any other remedy to which plaintiffs and those similarly situated could be entitled would be attended by such uncertainties and delays as to deny substantial relief, would involve a multiplicity of suits, cause further irreparable injury and occasion damage, vexation and inconvenience not only to the plaintiffs and those similarly situated, but to defendants, as well.

PRAYER FOR RELIEF

Wherefore, plaintiffs respectfully pray:

1. The Court, upon filing of this complaint, notify the Chief Judge of this Circuit as required by 28 U.S.C., § 2284, so that the Chief Judge may designate two other judges to serve as members of a three-judge court as required by Title 28, U.S.C., § 2282, to hear and determine this action.

2. The Court enter a judgment or decree declaring that § 31–101 of the District of Columbia Code is unconstitutional insofar as it purports to direct or does direct the nomination and appointment of the Members of the Board of Education of the District of Columbia by the District Judges of the United States District Court for the District of Columbia.

3. The Court issue a permanent injunction forever restraining the judicial defendants from executing, enforcing or administering so much of § 31–101 of the District of Columbia Code as empowers them to nominate and appoint members of the defendant Board of Education.

4. The Court enter a judgment and decree declaring that the defendant members of the Board of Education and the defendant Superintendent of Schools purporting to hold office in the District of Columbia have been illegally nominated and appointed thereto and declaring vacant each of said offices and nominating and appointing interim trustees or receivers to administer the District school system until certification of the results of at-large elections as hereinafter set forth, and subject to such directives as this Court may issue.

5. The Court enter a judgment or decree ordering and directing the Board of Elections of the District of Columbia promptly to schedule, hold and conduct

at-large elections for the nine vacant positions of members of the Board of Education with the duration and sequence of their said terms in conformity with the present duration and sequence thereof.

6. The Court issue a permanent injunction forever restraining and enjoining the defendants Board of Education and Superintendent of Schools and each of them from:

(a) any further utilization of the "track system" or any other ability grouping or other test or device that is intended to or does in fact discriminate on the basis of race and color as between the pupils under the control and supervision of defendants;

(b) any further utilization of plant, equipment, materials, supplies and curricula that is intended to or does in fact discriminate on the basis of race and color as between the pupils under the control and supervision of defendants;

(c) any delineation or demarcation of school zone lines that is intended to or does in fact discriminate on the basis of race and color as between the pupils under the control and supervision of defendants;

(d) any further matching or equaling of public revenues under the control and supervision of defendants with private funds that is intended to or does in fact discriminate on the basis of race and color as between the pupils under the control and supervision of defendants;

(e) any further acceptance of private funds that is intended to or does in face discriminate on the basis of race and color as between the pupils under the control and supervision of defendants;

(f) any further stationing of law enforcement officers in or about any school under the control and supervision of defendants that is intended to or does in fact discriminate on the basis of race and color as between the pupils under the control and supervision of defendants;

(g) any further utilization of funds provided by the Elementary and Secondary School Act of 1965 that is intended to or does in fact discriminate on the basis of race and color as between the pupils under the control and supervision of defendants;

(h) any further pursuance of educational policies and practices based upon race and color that foster or encourage juvenile delinquency among the infant and their classes;

(i) any further disproportionate assignment of teacher personnel that is intended to or does in fact discriminate on the basis of race and color as between the pupils under the control and supervision of defendants;

(j) any further dismissal of or refusal to appoint qualified Negro citizens to high administrative and/or policymaking positions in the district school system that is intended to or does in fact discriminate on the basis of race and color:

(k) any further refusal, neglect or failure to promote qualified Negro teachers that is intended to or does in fact discriminate on the basis of race and color;

(l) any further refusal, neglect or failure to demand of the Commissioners of the District of Columbia and the Congress those funds necessary to provide the infant plaintiffs and their classes with the quantity and quality of education equal to that provided to white children in the public schools of adjoining, adjacent and contiguous areas of Maryland and Virginia.

7. Plaintiffs further pray that the Court will allow them their costs herein and such further, other or additional relief as may appear to the Court to be equitable and just.

8. Plaintiffs further pray that the Court retain jurisdiction of this cause after judgment, to render such relief as may become necessary in the future.

WILLIAM M. KUNSTLER,
12 Tenth Street NE.,
Washington, D.C.
KUNSTLER KUNSTLER & KINOY,
511 Fifth Avenue,
New York, N.Y., 10017.
ARTHUR KINOY.
WILLIAM M. KUNSTLER.
Attorneys for Plaintiffs.

By WILLIAM M. KUNSTLER.
Of counsel:
WILLIAM L. HIGGS.

CITY OF WASHINGTON,
District of Coulmbia, ss:

Julius W. Hobson, being duly sworn deposes and says that he is one of the plaintiffs in the within action; that he has read the foregoing complaint and knows the contents thereof; that the same is true to his own knowledge, except as to matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

JULIUS W. HOBSON.

Sworn to before me this 13th day of January 1966.

Notary Public.

IN THE SUPREME COURT OF THE UNITED STATES

October Term]966

No.

Julius W. Hobson, Patricia S. Rosemond,
Grover C.Dye, and William Higgs,

Petitioners

v.

The Honorable Oliver Gasch, District
Judge of the United States District
Court for the District of Columbia,

Respondent

Petition for Writ of Certiorari to the
United States Court of Appeals for the
District of Columbia Circuit

Julius W. Hobson
Patricia S. Rosemond
Grover C. Dye
William Higgs

]2]0th St. NE
Washington, D.C.

Pro se

INDEX

PETITION FOR A WRIT OF CERTIORARI

Petioners, Julius W. Hobson, Patricia S. Rosemond, Grover C. Dye and William Higgs, on behalf of themselves and other citizens of the District of Columbia similarly situated, pray that a writ of certiorari issue to review the order of the Court of Appeals for the District of Columbia Circuit denying Petitioners' application for a writ of mandamus directing Respondent to certify the necessity for convening a statutory three-judge court to hear and determine Petitioners' Complaint.

Citations to Opinions Below

The order of the Court of Appeals denying Petitioners' application for a writ of mandamus, without opinion, is not yet reported (D.C. Cir., No. 20,388, Sept. Term,]966; Appendix A). The opinion of the District Court refusing to certify the necessity for convening a statutory three-judge court is reported at 255 Fed. Supp. 295 (1966).

Jurisdiction

The order of the Court of Appeals was entered on September 29, 1966. No application for enlargement of time to file this petition has been made.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C.]254 (]).

Questions Presented

1. Is a substantial Constitutional question presented by a claim that Acts of Congress totally withdrawing local self-government from citizens of the District of Columbia are inconsistent with the Ninth, Tenth, and Fifth Amendments to the Constitution and are thus an impermissible exercise of Congress' power of exclusive legislation over the District?

2. Is a substantial Constitutional question presented by a claim stating that Acts of Congress abolishing local self-government were passed for the purpose and with the effect of denying Negro citizens of the District of Columbia the right to vote on account of their race and that such Acts therefore violate the Fifteenth Amendment to the Constitution?

Constitutional Provisions and Statutes Involved

Constitution of the United States:

Article I, Section 8, Clause 17

The Congress shall have Power...

> To exercise exclusive Legislation in all Cases whatsoever, over such District, (not exceeding ten miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the erection of Forts, Magazines, and Arsenals, dock-Yards, and other needful Buildings; --And ....

Amendment V

> No person shall... be deprived of life, liberty, or property, without due process of law;....

Amendment IX

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Amendment X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Amendment XV

Section]. The right of citizens of the United States to vote shall not be denied or abridge by the United States or by any State on account or race, color, or previous condition of servitude.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

District of Columbia Code:

Section]-20]. Appointment of Commissioners.

The President of the United States, by and with the advice and consent of the Senate, is hereby authorized to appoint two persons, who, with an officer of the Corps of Engineers of the United States Army, shall be Commissioners of the District of Columbia. Vol.]. D.C. Code, p.8.

Section]-202. Engineer Commissioner may be designated from rank of captain or above.

Such engineer commissioner may, in the discretion of the President of the United States, be detailed from among the captains or officers of higher grade having served at least fifteen years in the Corps of Engineers of the Army of the United States. Vol.]. D.C. Code, p.9

Statement of the Case

Your four petitioners, all citizens of the District of Columbia -- two Negro, two white, filed a complaint (Exhibit A to Appendix B) on behalf of themselves and others similarly situated in the U.S. District Court of the District of Columbia on April 25,]966, setting forth essentially two claims: (]) the Acts of Congress dating from 1871 abolishing or withholding local self-government to the citizens of the District are not valid exercises of Congress' power of exclusive legislation over the District, since these Acts violate the Ninth, Tenth, and Fifth Amendments; and (2) beginning in 1871 and continuing until the present, Congress first abolished and then has withheld local self-government because the large and burgeoning Negro population of the District would give that population a major or controlling voice in the District's local governmental affairs, all contrary to the prohibition of the Fifteenth Amendment.

The District Court on May 4, 1966, in an opinion by Respondent (Exhibit B to Appendix B) refused to certify the necessity for the convening of a three-judge statutory court and found that Petitioners' claims were insubstantial. Petitioners had no opportunity to present either briefs or oral argument to the Court prior to its handing down the]2-page opinion nine days after the filing of the complaint.

On August 9, 1966, Petitioners applied to the United States Court of Appeals for the District of Columbia Circuit for a writ of mandamus requiring Respondent to certify affirmatively as to the need for a three-judge court (Appendix B). On September 29, 1966, the Court of Appeals, acting in

chambers and with one judge not participating, but upon consideration of briefs from both opposing sides, denied Petitioners' petition for the writ of mandamus (Appendix A). It is of this order of the Court of Appeals that Petitioners request review in this Court by writ of certiorari.

Reasons for Granting the Writ

Petitioners respectfully suggest that there are four reasons of moment for granting the writ.

First, no legal circumlocution can obscure the fact that the consequences of an ultimate favorable ruling for Petitioners would mean self-government for the citizens of the nation's capital city and the opening of the way for the solution of problems of the District's nearly one million citizens -- problems that are growing increasingly acute. Where such consequences are in the balance, Petitioners ernestly believ e that they -- and any others as amici curiae -- should be entitled to a full and considered hearing as which adequate time is accorded for an in-depth exploration of all issues, particularly the extensive questions of Constitutional and legislative history.

Secondly, the decisions of this Court, especially at the last two terms, raise serious doubts as to the correctness of the decisions of the District Court and of the Court of Appeals as a matter of federal Constitutional law.

This Court has recently had occasion to emphasize the keystone role of suffrage. Mr. Justice Black summarized the Court's views on the right to vote in Wesberry v. Sanders, 376 U.S.],]7,]8 (]964):

> No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined. Our Constitution leaves no room for classification of people in a way that unnecessarily abridges this right. (emphasis added)

In Reynolds v. Sims, 377 U.S. 533 (1964), the Chief Justice wrote at p. 562:

> Almost a century ago, in Yick Wo v. Hopkins, 118 U.S. 363, the Court referred to "the political franchise of voting" as "a fundamental political right, because preservative of all rights." 118 U.S., at 370. ....
>
> It could hardly be gainsaid that a constitutional claim had been asserted by an allegation that certain otherwise qualified voters had been entirely prohibited from voting for members of their state legislature.

In Griswold v. Connecticut, 381 U.S. 479 (1965) Mr. Justice Goldberg in his concurring opinion joined in by the Chief Justice and Mr. Justice Brennan, pointed out that the Ninth Amendment "simply shows the intent of the Constitution's authors that other fundamental personal rights should not be denied such protection or disparaged in any other way simply because they are not specifically listed in the first eight constitutional amendments" (at p. 492).

The wealth of possibly relevant historical materials on the question of the nature of the Ninth and Tenth Amendments' protection of the rights of self-government and suffrage as against enc roachment by the national government becomes apparent with study; however, two examples of gleanings from these materials seem particularly appropriate here. (1)The Maryland Declaration of Rights, (1776) which applied to the land now comprising most of the District of Columbia, and which existed at the time of the Ninth Amendment's adoption, stated

> That the right in the people to participate in the legislature is the best security of liberty, and the foundation of all freegovernment; for this purpose elections ought to be free and frequent, and every man having property in, a common interest with, and an attachment to the community, ought to have a right of suffrage.(Thorpe, American Charters, Constitutions and Organic Laws, Vol. 3, p. 1687, (1909)).

(2) James Madison, who introduced what became the Ninth Amendment, justified it on the ground that "It has been objected also against a bill of rights, that, by enumerating particular exceptions to the grant of power, it would disparage those rights which were not placed in that enumeration.... but, I conceive, that it may be guarded against, I have attemted it [in the Ninth Amendment] " (I Annals of Congress 456 (June 8, 1789).). In Madison's original version, the Amendment read

> The exceptions here or elsewhere in the Constitution, made in favor of particular rights, shall not be so construed as to diminish the just importance of other rights retained by the people, or as to enlarge the powers delegated by the Constitution; but either as actual limitations of such powers, or as inserted merely for greater caution..." (I Annals of Congress 452)(June 8, 1789).

Thirdly, Petitioners are not aware of any previous case in which this Court has had squarely presented the question of the scope of the Ninth, Tenth, and Fifth Amendments in protecting as against the federal government the twin rights of self-government and suffrage whether or not considered in the context of the District of Columbia Clause of the Constitution. Of course, in Bolling v. Sharpe, 347 U.S. 497 (1954), this Court considered the District of Columbia Clause to be no barrier to the Fifth Amendment's protection of equal educational opportunity as against action by the national government.

Finally, Petitioners believe that the nature of the application of the Fifteenth Amendment to the United States is flatly an open question. Though the District Court (Exhibit B to Appendix B at pp. 8-10) first -- and not unreasonably -- assumed that the rich gloss given by this Court to the Fifteenth Amendment as applied to the States would be no different when the United States were under consideration, that Court then, Petitioners most respectfully submit, proceeded to give a totally unwarranted and just plain wrong interpretation to this Court's Fifteenth Amendment decsions.

The District Court states:

> It is clear by a reading of the Fifteenth Amendment that the words "on account of" denote a factor of causation, namely, that a person of one race is denied the right to vote whereas a person of another race, similarly situated, enjoys the right to vote... In view of the Supreme Court's interpretation of the Fifteenth AMendment, it is clear that the evil which was intended to be remedied by such AMendment was racial discrimination in voting. Turning to the challenged sections of the District of Columbia Code, no citizen of the District of Columbia possesses the right to vote insofar as the local government is concerned. By choosing to live within the District of Columbia, all citizens, regardless of race, relinquish the right to vote in local elections. As provided in the Twenty-third Amendment, their influence on the form of government which exercises jurisdiction over them is limited to the right to vote for the President.
> Therefore, since the Negro plaintiffs in the instant case have made no allegation of racial discrimination, the Fifteenth Amendment is not applicable and the Court declines to convene a three-judge court to examine the constitutionality of §§ 1-201 and 1-202 of the District of Columbia Code in light of that Amendment.(Exhibit B to Appendix B. (At pp. 8-10)).

With deference, Petitioners further suggest that the District Court has transferred Equal Protection Clause notions into the otherwise explicit language of the Fifteenth Amendment and that this is both an erroneous and unfortunate occurrence. One might gather from the District Court's reasoning that the Alabama Legislature in Gomillion v. Lightfoot (364 U.S. 339 (1960)) could, without fear of the Fifteenth Amendment, have proceeded to abolish local self-government in Tuskegee by denying the franchise to all citizens white as well as black, while simultaneously establishing a municipal government appointed by Governor Wallace, all done for demonstrably racial reasons.

Conclusion

For the reasons stated above, Petitioners respectfully suggest that a writ of certiorari would most properly issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

_____
Julius W. Hobson

_____
Patricia S. Rosemond

_____
Grover C. Dye

_____
William Higgs

Petitioners, pro se

No. 171 Misc.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

JULIUS W. HOBSON, INDIVIDUALLY AND ON BEHALF OF JEAN MARIE HOBSON AND JULIUS W. HOBSON, JR., ET AL., APPELLANTS

v.

CARL F. HANSEN, SUPERINTENDENT OF SCHOOLS OF THE DISTRICT OF COLUMBIA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MEMORANDUM FOR APPELLEES

CHARLES T. DUNCAN,
Corporation Counsel for the
District of Columbia,
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IN THE SUPREME COURT OF THE UNITED STATES

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JULIUS W. HOBSON, INDIVIDUALLY AND ON BEHALF OF JEAN MARIE HOBSON AND JULIUS W. HOBSON, JR., ET AL., APPELLANTS

v.

CARL F. HANSEN, SUPERINTENDENT OF SCHOOLS OF THE DISTRICT OF COLUMBIA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MEMORANDUM FOR APPELLEES

Section 31-101 of the District of Columbia Code provides that the members of the Board of Education of the District of Columbia "shall be appointed by the United States District Court judges of the District of Columbia." In this action before a three-judge court, appellants sought (1) a declaratory judgment that Section 31-101 is unconstitutional and (2) an order enjoining further appointments under that provision, declaring the offices of the Board of Education vacant, and directing election of a new Board.[1/] The court, in an opinion by Circuit Judge Fahy (265 F. Supp. 902), upheld Section 31-101 as authorized by both the District

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1/ Other counts of the complaint, alleging discriminatory and illegal action by the Board in violation of appellants' rights, were referred to a single district judge for trial. He recently entered a decree enjoining defendants from discriminating in the operation of the District of Columbia public school system, and requiring certain specific steps to implement this prohibition. Hobson et al. v. Hansen et al., D.D.C. Cir. No. 82-66, June 19, 1967 (Wright, Circuit Judge, sitting by designation).

Clause of Article I of the Constitution[2] and the appointments clause of Article II.[3] Circuit Judge Wright dissented.

Section 31-101 was adopted by Congress in 1906. 34 Stat. 316. Prior thereto the Board of Education had been appointed by the District Commissioners. The Board, however, was accused of "incompetency, of weakness, of incapacity, of indifference" (40 Cong. Rec. 5760); several examples of maladministration by the Board were cited; and it was argued that an amendment vesting the appointment authority in the judges of the Supreme Court of the District of Columbia (now the United States District Court) was necessary "so that the school system may be entirely divorced from the rest of the municipal government, just as the schools are divorced from the rest of the municipal government in almost every other community * * *" (40 Cong. Rec. 5756). The proponents stated their preference for having the Board of Education elected by the people of the District (40 Cong. Rec. 5758, 5761), but believed that this was not politically feasible. Ibid.[4] It was argued that the system of appointment by judges had worked successfully in Philadelphia (40 Cong. Rec. 5758, 5759) and that the judges would be free from municipal politics and yet familiar with the problems of the District (40 Cong. Rec. 5758, 5762). The amendment carried (40 Cong. Rec. 5763) despite opponents' arguments that the court should not be given "political power" (40 Cong. Rec. 5759) and that the Board of Education is "of the executive department of the

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2/ Article I, Section 8, Clause 17, authorizes Congress to "exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States * * *."

3/ Article II, Section 2, Clause 2, provides that "the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law or in the Heads of Departments."

4/ "To have the judges of the supreme court of the District appoint the trustees is the proposition which strikes me most favorably * * *, for I can not get the trustees elected, as they ought to be." 40 Cong. Rec. 5762. Another alternative to appointment by the Commissioners suggested was appointment by the President, but it was felt that the President was not sufficiently familiar with the affairs of the District and should not be burdened with the appointment of local officials. 40 Cong. Rec. 5760, 5761-5762.

District and has no relation whatever to judicial functions." 40 Cong. Rec. 5763.

1. It has long been held that the courts established by Congress for the District of Columbia may be required to decide questions which are not within the "case or controversy" limitation of Article III. Keller v. Potomac Elec. Co., 261 U.S. 428; Postum Cereal Co. v. California Fig Nut Co., 272 U.S. 693; Federal Radio Comm'n v. General Electric Co., 281 U.S. 464. Until the decision in O'Donoghue v. United States, 289 U.S. 516, this holding was based on the view that the courts of the District had been established exclusively under Article I, Section 8, Clause 17 (the District clause), rather than under Article III. See Glidden Company v. Zdanok, 370 U.S. 530, 539. In the O'Donoghue decision, this Court held that the judges of the District of Columbia federal courts[5/] were entitled to the protection of the clause in Article III forbidding reduction in compensation. But no one suggested that all of the limitations of Article III were applicable to these courts. On the contrary, the Court indicated that the "case or controversy" limitation was not, for it reaffirmed the power of Congress to "clothe the courts of the District not only with the jurisdiction and powers of federal courts in the several States but with such authority as a State may confer on her courts." 289 U.S. at 545-546, quoting Keller v. Potomac Elec. Co., 261 U.S. 428, 442-444. Since States often delegate to their courts authority to appoint non-judicial officers, including members of school boards,[6/] it would seem to follow that Congress may vest the same authority in the federal courts of the District of Columbia.

To be sure, the plurality opinion in Glidden Company v. Zdanok, 370 U.S. 530, 580-582, suggests that at least one aspect of the "case or controversy" limitation of Article III--"to safeguard the independence of the judicial from the other branches by confining its activities to 'cases

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5/ O'Donoghue involved the Supreme Court of the District of Columbia, predecessor of the United States District Court, and the Court of Appeals for the District of Columbia, predecessor of the United States Court of Appeals for the District of Columbia Circuit.

6/ See cases collected in note 7 of the majority opinion below.

of a Judiciary nature'"--"remains fully applicable [in the District] at least to courts invested with jurisdiction solely over matters of national import." 370 U.S. at 582. However, Section 31-101 does not, in our view, infringe the independence of the federal judiciary in the District. This is not a case, like O'Donoghue, where the judges' independence is threatened by Congressional power over their salaries. And while there is a theoretical possibility that the District judges could be so burdened with administrative tasks as to impair their ability to decide cases, Congress can control the workload of federal judges by fixing the number of judges and determining the extent of federal court jurisdiction. Finally, we do not think it inevitable that the appointment of Board of Education members would compromise the ability of the court to decide cases questioning the official conduct of such members.

2. Section 31-101 is further supported by the appointments provision of Article II, which permits the Congress to "vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." In Ex parte Siebold, 100 U.S. 371, this Court held that Congress could delegate to the United States Circuit Court authority to appoint supervisors of election, despite a contention that the duties of such supervisors were entirely executive in character:

> It is no doubt usual and proper to vest the appointment of inferior officers in that department of the government, executive or judicial, or in that particular executive department to which the duties of such officers appertain. But there is no absolute requirement to this effect in the Constitution; and, if there were, it would be difficult in many cases to determine to which department an office properly belonged * * *.

100 U.S. at 397.[7/] In Siebold, this Court further concluded that there

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7/ The primary duty of these supervisors was to observe elections and report to the House of Representatives, so that the House could exercise its constitutional function of judging the outcome of congressional elections. 16 Stat. 435-436. With respect to this duty, the supervisors could hardly have been characterized as court-related officers. The supervisors also had power to observe and report on State and municipal elections, and the federal courts had jurisdiction to count ballots and declare winners in such elections where there were alleged deprivations of the right to vote on account of race. 16 Stat. 146. As to such elections, supervisors could be characterized as court-related officers, roughly similar to special masters. However, the elections for which the supervisors in Siebold were appointed were elections to the House of Representatives. At no point in the Siebold opinion is there any intimation that the holding is based on any relationship between the supervisors and the judiciary.

was "no such incongruity in the duty required as to excuse the courts from its performance * * *." 100 U.S. at 398.

There is similarly no incongruity between the appointment authority conferred by Section 31-101 and the judicial duties of the District Court. In enacting Section 31-101 Congress was dealing with a unique situation. Not only was there no State judiciary in the District but the District had no elected legislature or executive; and the sponsors of the legislation, while believing that direct election of the Board of Education would be preferable, found that this was not politically obtainable.[8/] In this situation, a basic objection to involvement of the judiciary in the appointment of administrative officials--that the power to appoint should be exercised by individuals responsible to the electorate--was not pertinent. Congress could reasonably conclude that, as in Siebold, "it cannot be affirmed that the appointment of the officers in question could, with any greater propriety * * * have been assigned to any other depositary of official power capable of exercising it." Ex parte Siebold, 100 U.S. 371, 398.

8/ Election of the Board of Education is not obtainable as a matter of legal right. Although appellants' complaint asks for an order directing election of the Board members, they would not be entitled to it even if Section 31-101 were held invalid. Hobson v. Tobriner, 255 F. Supp. 295 (D.D.C.), petition for writ of mandamus denied sub nom. Hobson v. Gasch, C.A. D.C. No. 20,388, (September 26, 1966), certiorari denied, 386 U.S. 914. If Section 31-101 were invalidated appellants might be entitled to an order directing appointment of the Board members by the District Commissioners, since this was the system in effect prior to the enactment of Section 31-101 in 1906. 31 Stat. 564; H.R. Rep. No. 3395, 59th Cong. 1st Sess., p. 3. Appellants, however, have not asked for such relief, and have not joined the District Commissioners as parties to this action. Alternatively, if the old law were not viewed as coming back into force, the appointment of Board members might be governed by the first provision of the appointments clause of Article II which directs the President, acting with the advice and consent of the Senate, to appoint "all officers of the United States" whose appointment is not otherwise provided for by the Constitution or congressional legislation.

CONCLUSION

For the foregoing reasons, we believe the judgment of the district court is correct and should be affirmed. To be sure, appellants' challenge to the constitutionality of Section 30-101 raises questions relating to the powers of Congress and the proper functions of federal courts. As a practical matter, however, these issues concern only one agency of the District of Columbia, and, even there, legislative proposals for governmental reorganization may soon moot the constitutional debate. Accordingly, it would be appropriate, in our view, to enter a judgment of summary affirmance.

Respectfully submitted.

CHARLES T. DUNCAN,
Corporation Counsel for the
District of Columbia.

THURGOOD MARSHALL,
Solicitor General.

CARL EARDLEY,
Acting Assistant Attorney General.

JOHN C. ELDRIDGE,
ROBERT V. ZENER,
Attorneys.

JULY 1967.

NOTICE OF APPEAL TO THE
SUPREME COURT OF THE UNITED STATES

I. Notice is hereby given that plaintiffs in the herein action, individually and as representative of all others similarly situated, hereby appeal to the Supreme Court of the United States from the order of this Court of February 9, 1967, denying plaintiffs' motion for summary judgment and granting the motion of defendant United States District Judges for the District of Columbia to dismiss Count 1 of the complaint herein.

This appeal is taken pursuant to 28 U.S.C. 1253.

II. The Clerk will please prepare a transcript of the record in this cause for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

(a) The complaint.

(b) Plaintiffs' motion for summary judgment.

(c) Motion of the United States District Court Judges for the District of Columbia to Dismiss the Complaint, and their opposition to plaintiffs' motion for summary judgment.

(d) Opposition of defendants except the Judges of the United States District Court for the District of Columbia to plaintiffs' motion for summary judgment.

(e) The answers of defendants.

(f) Opinion of Judge Wright dated March 25, 1966.

(g) Designation of Judges to Serve on Three-Judge Court, dated March 29, 1966.

NOTICE OF APPEAL TO THE
SUPREME COURT OF THE UNITED STATES

I. Notice is hereby given that plaintiffs in the herein action, individually and as representative of all others similarly situated, hereby appeal to the Supreme Court of the United States from the order of this Court of February 9, 1967, denying plaintiffs' motion for summary judgment and granting the motion of defendant United States District Judges for the District of Columbia to dismiss Count I of the complaint herein.

This appeal is taken pursuant to 28 U.S.C.

1253.

II. The Clerk will please prepare a transcript of the record in this cause for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

(a) The complaint.

(b) Plaintiffs' motion for summary judgment.

(c) Motion of the United States District Court Judges for the District of Columbia to Dismiss the Complaint, and their opposition to plaintiffs' motion for summary judgment.

(d) Opposition of defendants except the Judges of the United States District Court for the District of Columbia to plaintiffs' motion for summary judgment.

(e) The answers of defendants.

(f) Opinion of Judge Wright dated March 25, 1966.

(g) Designation of Judges to Serve on Three-Judge Court, dated March 29, 1966.

(h) Order of Judge Wright dated April 18, 1966.

(i) Motion of all defendants except the defendant Judges for this Court to rescind its order dated April 18, 1966 and to refrain from exercising jurisdiction in this case while sitting as a single-judge court.

(j) Motion of all defendants except defendant Judges of the United States District Court to amend the order of Judge David L. Bazelon filed herein on March 29, 1966.

(k) Motion of all defendants except the defendant Judges addressed to the three-judge court to assume jurisdiction over the entire case and to stay further action pending disposition by the court of the constitutional questions raised in the complaint.

(l) Order of Judge Bazelon filed June 1, 1966.

(m) Order of Judge Wright filed June 1, 1966.

(n) Order of three-judge court filed June 1, 1966.

(o) Opinion of three-judge court dated February 9, 1966 (as amended by Order dated February 23, 1967).

(p) Judgment of three-judge court dated February 9, 1966.

III. The following question is presented by this appeal: whether D.C. Code, §31-101 (1961 ed.) is facially violative of the Constitution of the United States and, in

(m) order of angle matrix dated June 1, 1966.

(n) order of three-angle conic filed June 1, 1966.

(o) opinion of three-angle conic dated February 3,
1967 (as amended by order dated February 23,
1967).

(p) judgment of three-angle conic dated February
3, 1967.

III. The following direction is presented by this
appeal: Whether D.C. Code, 1973 Ed. (1967 Ed.) is facially
valid as the construction of the United States Court, in